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REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

2858 F

OF

THE STATE OF MISSOURI.

By SAMUEL A. BENNETT,
REPORTER.

VOL. XVI.

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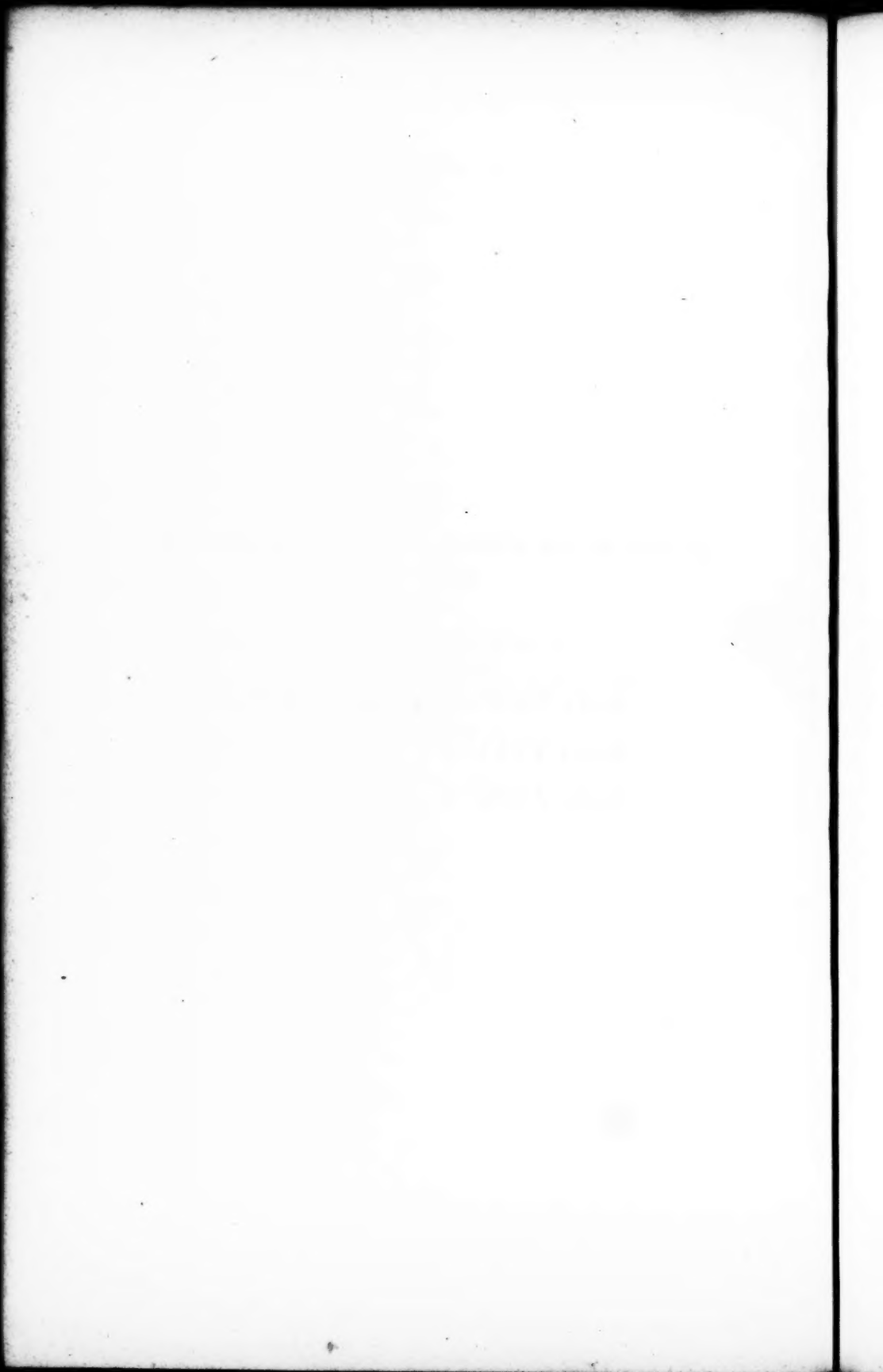
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JUDGES OF THE SUPREME COURT OF THE STATE OF
MISSOURI.

HON. HAMILTON R. GAMBLE.

HON. WILLIAM SCOTT.

HON. JOHN F. RYLAND.



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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
OF THE  
STATE OF MISSOURI,  
MARCH TERM, 1852, AT ST. LOUIS.

[CONTINUED FROM VOL. XV.]

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FRYE, *et al.*, Appellants, *vs.* KIMBALL, Respondent.*

The third and fifteenth sections of the act of the Missouri Legislature, concerning executors and administrators, approved February 21st, 1825, have no retrospective operation, and do not, of themselves, without some action of the court, have the effect to revoke the letters of an administratrix, who had married before the passage of the act.

*Appeal from St. Louis Circuit Court.*

THIS was ejectment, in the St. Louis Circuit Court, against Kimball, tenant of the Lindells, for a piece of ground lying in the city of St. Louis. It was tried at the November term, 1847, and there was a verdict and judgment in favor of the defendant.

On the 10th of August, 1824, letters of administration were issued by Silas Bent, clerk of the St. Louis County

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*This case was determined at the March term, 1850, and should have been published in Vol. xiii of the Missouri Reports.

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Court, to Elizabeth Hinderlong, on the estate of Jacob Frye, *alias* Hinderlong, late of said county, which were duly recorded on the same day, she having given bond, with J. Spalding and Frederick Dent as securities, in due form, in the sum of \$5000, for the faithful administration of the said estate.

On the 29th of December, 1824, appraisers were sworn, and made an inventory and appraisement of the property of Jacob Hinderlong, *alias* Jacob Frye, which were filed on the 24th of March, 1826. The appraisement amounted to \$778 25. Previous to March 24th, 1826, sale was made of the inventoried articles, amounting to \$507 50½. After the letters were issued, and somewhere about January 1st, 1825, said Elizabeth Hinderlong intermarried with one John Vogle.

On the 24th of March, 1826, a settlement was made with the Probate Court, under the style of John Vogle and Elizabeth, his wife, administrator and administratrix of Jacob Hinderlong, *alias* Jacob Frye, deceased, when the court ascertained that the administrators had received, on account of the estate, \$716 12½, and had expended \$843 58½, leaving a balance against the estate of \$127 45½.

On the 26th of September, 1826, John Vogle and his wife Elizabeth, administrators of Jacob Frye, *alias* Hinderlong, made another settlement, wherein the entry is, that they have received, since the last settlement, \$56 30½, and have disbursed since the last settlement, and including the balance thereof, \$207 46½, leaving a balance in favor of said administrators, against said estate, of \$152 15½; and on the 16th of August, 1828, the court discharged them from any process, unless on application of some one interested.

On the 25th of March, 1826, a petition, which was sworn to, was presented to the Probate Court, by John Vogle and Elizabeth, his wife, administrator and administratrix of Jacob Hinderlong, *alias* Jacob Frye, for an order for the sale of so much real estate as would pay and satisfy the remaining debts, alleging that the assets that had come to their hands, amounted to the sum of \$716 12½, and that the debts proved and allowed



against the estate, by the Court of Probate, amounted, as per schedule, to the sum of \$1847 30, and that there was no personal property remaining, nor any debts available. A list of the debts allowed and of the real estate accompanied the petition, consisting of two pieces only, one of which was half of the brick house, and the other was the land in question, consisting of about five arpens, then lying just west of the city of St. Louis. An order of publication was made, returnable to the third Monday of June. At the June term, 1826, an order, reciting publication proved, &c., and that there were no moneys or personal effects for the payment of debts, was made for the sale of the half of a brick house, one of the pieces of property belonging to Frye, at the time of his death.

At the September term, 1826, on the 26th of the month, the report of the sale of the half of the brick house was continued.

On the 6th of October, 1826, John Vogle and wife, administrators, &c., report the sale of the half of said brick house to Frederick Dent, for \$700, which was confirmed.

Afterwards, at the December term, 1826, to-wit, on the 4th of January, 1827, said John Vogle and wife, administrators as aforesaid, filed their petition, sworn to, setting forth that the sale of the half of the brick house did not bring enough, with the personal effects, to pay the debts of the deceased, and praying for an order for the sale of the other piece of real estate, to-wit, a house and six arpens of land in the vicinity of St. Louis, being the same that Jacob Frye died possessed of, and part of the land owned by Jeremiah Conner. Thereupon, an order is made by the court, for publication of notice to all interested in said application, and that it will be granted, unless cause can be shown to the contrary, at the next term, &c., and a sale be ordered of said land, describing it as above.

On the 19th of March, 1827, the court take up the petition, and state that the publication of the notice has been made according to law, and that there are no assets or personal effects to pay the debts, and thereupon, order the said administrator

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and administratrix, on the first Monday of May then next, at the court house door, in the city of St. Louis, to proceed to sell, at public auction, for cash, during the sitting of the Circuit or Probate Court, the said land described as above, first having the same appraised, and notice published four weeks in a newspaper, and advertisements put up in ten public places, twenty days before sale.

On the 8th of May, 1827, the said John and Elizabeth, administrator and administratrix of Jacob Frye, *alias* Hinderlong, deceased, file their report, which the County Court then approve, the jurisdiction of the Court of Probate having, in the mean time, been transferred to the County Court; which report set forth that the house and lot mentioned in the order of sale were exposed to sale, to the highest bidder, during the sitting of the Circuit Court, on the first Monday, being the seventh day of May, the sale having been duly advertised, according to the direction of the order, and the appraisement having been made; and that Jesse Lindell was the highest bidder for the same, at the sum of \$1040, and that they are ready to make a deed as soon as the report should be approved. The appraisement is returned with the report, as having been made on the fifth day of May, 1827, at \$1000, together with the affidavit of the appraisers.

The record does not state that this report was verified by affidavit.

Immediately after the approval of the said report, the deed was made by John Vogle and Elizabeth, his wife, dated May 8th, 1827, to Jesse G. Lindell and Peter Lindell, which deed recited the order of sale, appraisement, advertisement of sale, sale to the Lindells, and report and ratification thereof, and purported to convey all the right and estate of Jacob Frye, *alias* Hinderlong, at the time of his death.

This deed was acknowledged by John Vogle and wife, as administrator and administratrix of Jacob Frye, *alias* Hinderlong, deceased, in the County Court of St. Louis county, on the ninth of May, 1827, and was recorded on the twenty-

second day of the same month ; but the certificate of acknowledgment does not state that they were personally known, &c.

On the 15th of February, 1828, under the title of " John Vogle, administrator, and Elizabeth Vogle, administratrix of Frye, *alias* Hinderlong, report of sale," is the following entry, viz :

" It is ordered by the court that the entry made in book B, page 312, of November 8th, 1827, of the minutes of the court, be expunged, and the following entry made in lieu thereof," and then follows an order, purporting to confirm the same report and make it valid forever, which order is a long and formal entry.

It appeared that Jacob Frye, *alias* Hinderlong, owned the property and lived on it, at the time of his death ; that the plaintiffs are his children, and were under age, at the time of his death.

The plaintiffs asked an instruction, that if Jacob Frye was seized at his death and the plaintiffs were his heirs at law, they were entitled to recover, which was refused. One was given for the defendant, to the effect that the record from the Court of Probate and the deed to the Lindells were sufficient to pass the title.

The sole question is, whether the administration sale and the deed to the Lindells was void.

*F. M. Haight, Leslie & Lord*, for plaintiffs in error.

The third and fifteenth sections of the act of 1825, concerning executors and administrators, expressly prohibit a married woman from acting as executrix or administratrix, after the law should take effect. The administration sale was, therefore, void.

The legislature had power to pass this act. Its power to suspend an administration, to change, alter or modify laws for the distribution or settlement of the estates of decedents, cannot be questioned.

This law was not *ex post facto*, because it does not apply to criminal proceedings.

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It is not retrospective, because it does not affect the validity of past transactions.

It does not impair the obligation of contracts, because there is no contract to be impaired. 22 Pick. 430; 6 Pick. 501.

The meaning of the term "contract," as used in the Constitution of the United States, is well defined in the case of *Dartmouth College v. Woodward*, 1 N. H. 111.

John and Elizabeth Vogle, being prohibited by law from acting in the administration of this estate, could not, with the aid of any decree or order of a Probate Court, confer a valid title. 6 Wheat. 119. 7 Wend. 148.

That the sale took place under the sanction of a court, will not prevent its validity from being inquired into, *collaterally*, in this suit. There is a distinction to be observed between the erroneous decree of a court which has jurisdiction, and the decree of a court which has no jurisdiction. 1 Peters, 340. 3 Howard, 762. 9 Cow. 227. 19 J. R. 39. 1 Hill, 130. 3 Howard, 762.

The ground of the jurisdiction of an inferior tribunal, must appear on the face of the proceedings. *Walker v. Turner*, 9 Wheat. 541.

As to jurisdiction of Probate Courts, see 14 Mass. 222. 4 N. H. 65. 1 Hill, 130. 2 Vermont, *Washburn's Dig.* 647. 1 Howard, (Miss.) 439. 6 ib. 114, 234. 9 S. & M. 505. 3 J. J. Marsh. 105. 10 Peters, 161. 6 Iredell's Rep. 27. 3 Stewart & Porter, 355. 5 Monroe, 42. 8 Cranch, 9. 4 Day, 137. 12 Mass. 503. *Barber v. Bush*, 7 Mass. 510.

On the application for the second order, under which the sale was made, there was no account or statement of the then condition of the estate. 1 Hill, 130. 12 Serg. & Raw. 171.

No affidavit was annexed or filed with the report of sale, and the report did not contain the requisite pointed out by statute. No copy of the advertisement accompanied the report.

More land was sold than sufficient to pay the debts, and the sale was, therefore, void. 15 Pick. 23. 4 N. H. 166.

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No guardians were appointed for the plaintiffs, who were minors.

The deed was not duly acknowledged, as required by the statute.

The appointment is not set out in the deed.

*J. E. Munford*, for same, cites 4 Mass. R. 354. 7 Mo. 374. 4 Humph. 79. Williams on Executors, vol. 1, p. 266. Roper on Husband and Wife. 30 Law Lib. side page 188. Toller on Executors, 6th Lond. ed., p. 91. 11 Serg. & Raw. 441. 17 Serg. & Raw. 392. *Bartlett v. King*, 12 Mass. 563. 2 Peters, 492. 1 Hill, 139. 20 Wend. 245. 15 Do. 449. 5 Dana, 585. 5 Humph. 96. 4 Yerger, 218. 6 Do. 522. 10 Do. 237. 7 Mo. 426. 6 Cow. 224. 12 Mo. 63. 12 Ohio, 271. 6 Smed. & Mar. 259. 7 Do. 449. 7 Shep. 400. 15 Pick. 31. 4 N. H. 167. 8 Met. 363. 20 Wend. 241. 1 App. 150.

*J. Spalding*, for defendant in error.

I. The marriage of Elizabeth-Hinderlong was after the grant of letters to her, and before the act on administration, contained in Rev. Code of 1825, took effect. Her letters were not revoked by the third and fifteenth sections of that act, nor by the marriage. 1 Williams on Executors, 267. 2 Do. 632, 633. Com. Dig. Administrator, D. 1 vol. 469, 487. That at common law, married women could administer, cites Roper on Husband and Wife, 187, (30 Law Lib. 119, 120.) 7 Mass. 510, directly on the point.

At any rate, the act on "laws," Rev. Code of 1825, p. 500, sec. 13, preserved the letters and authority, even if the case were embraced in the words of the administration act.

The constitution forbids the construction contended for, as it would make the act retrospective and operative to avoid vested rights.

That the letters continued in force, notwithstanding the marriage, in such cases, was the cotemporaneous construction of the act, and should be so held now. 15 Ohio, 703.

II. The sale is not invalid by reason of the nonproduction of

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an account and list, &c., filed with the petition on which the order of sale was made, nor for any other alleged irregularities before the deed, such as want of affidavit, &c. 10 Peters' Rep. 473. 2 Howard, 319. 2 Peters, 157. 11 Serg. & Raw. 422, 425-6, &c., 429, 431. 11 Mass. Rep. 227, (refers to and is supported by 7 Mass. 292.) 5 Ham. (Ohio,) 294-500. 3 Ohio Rep. 272-553. 4 Dana, 429. 2 Vermont, 253. Rev. Code, 1825, p. 106, sec. 40, describes the mode of application, and says, that on filing the petition and the account of his administration, the order shall be made, &c. Page 110, section 46, shows that it is not necessary to go over the whole matter *de novo*, where the first sale does not raise the money.

The first petition was accompanied with a list of lands and of demands allowed; and alleges that there was no personalty, incorporating, by reference, the settlement with the court that had been made the day before, (24th March, 1826,) and is sworn to; and the sale having been made of same property, and not bringing enough, the second order was merely a continuation of the proceeding, and needed no new petition, though one in fact was presented, and a new notice given, &c., before the order to sell the property in question was made. See Code of 1825, p. 110. 2 Vermont, 253, *Langdon v. Strong, et al.* The court decide, among other things, that an administration sale was not void, because the appraisal was made after the date of the deed, though the law requires it to be made before. 2 Green's Chy. Rep. 147, 156, 165. 1 Wash. Rep. 317, *Administrators of Tryon v. Tryon*, that the Probate Court, though of a limited jurisdiction, is entitled to same presumptions in its favor as other courts. 6 Porter, 219, *Wyman, et al., v. Campbell*, to same effect. 6 Porter, 262. 15 Ohio Rep. 689. This was a case where the same doctrine was laid down as in 2d of Howard's Rep., viz: that sale by administrator is a proceeding *in rem*, that if there be jurisdiction, the title passes, &c.

On filing the sworn petition, with the list of lands and of



debts and account of administration incorporated by reference, jurisdiction attached.

3 New Jersey Rep. 73, as to what confers jurisdiction, and that Probate Court is not of limited jurisdiction in such sense as a justice of the peace, &c.

III. The deed is not invalid because Peter Lindell is a grantee in it.

Shep. Touch. 234-5. If a grant be to A & B, if A cannot take, the whole goes to B.

7 Ham. (Ohio) Rep. 340, *Ewing v. Higby*. An administrator may convey to the assignee of the purchaser. 1 Dana, 212. 5 Miss. Rep. 314. The same as to sheriffs' deeds.

IV. The sale and deed are valid, even if the administration act of 1825 did operate upon the letters granted to Elizabeth Vogle, while *sole*. The administration had regularly begun; she and Vogle, after the marriage, were continually recognized by the Probate Court, on its records, as having full powers as administrators, no revocation having been made.

The act of 1825 contemplated a revocation of letters, in case of marriage, before the letters should be a nullity, as to third persons. The general doctrine, as to officers *de facto*, is applicable. Suppose the marriage had been secret, and kept secret for years, would the letters, and all acts under them, be held void, as soon as the marriage could be proved?

V. The order to sell was the judgment of a court of general jurisdiction, in a case within its jurisdiction; and the confirmation was likewise the judgment of the same court, upon the act of sale, after it was done; both of which judgments presuppose every thing done requisite to their validity, and are entirely conclusive, if the jurisdiction had attached. That it had attached is plain. 2 Howard, 319. 15 Ohio, 689. 4 Dana, 429.

VI. The application of the rigorous doctrine contended for, to administration sales, made twenty years ago, and upwards, is improper and unwise, and would overthrow nearly all such

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sales. This consideration justly influences the action of all courts, and should have great weight here as to early sales. 2 Howard, 319. 5 Ham. 294-500. 15 Ohio Rep. 703.

The decisions of sister States, avoiding such sales, for technical irregularities, should have no weight with us. Such sales depend on the peculiar statutes, and the peculiar practice and modes of proceeding, and general policy and spirit of legislation of each State.

VII. The *deed is not inoperative* for the reason that the certificate does not state *that the parties were known to the court*, because this suit is between *original parties* to the deed, or rather, between original grantees and heirs of the grantor.

Rev. Code, 1825, p. 221, sec. 14, shows the intent of the act to be, to protect "*subsequent purchasers and mortgagees.*" The plaintiffs here are heirs.

*Gamble & Bates*, for same.

The marriage of Mrs. Fry or Hinderlong, did not have the effect to revoke her letters.

At common law, the marriage of a *femme sole* did not avoid her administration. 1 Williams on Executors, 267. 2 ib. 632, 633.

The act of 1825 was prospective, operating only on administrations where the *femme sole* administratrix should marry after it took effect. Such is the meaning of the language employed in sections 3 and 15.

The administrator acquires a vested interest in the goods of the intestate, which is property recognized in every tribunal, and this interest can no more be divested, without default and without trial, than can the full property of any owner. Here, the marriage of the administratrix was prior to the taking effect of the act of 1825. 1 Williams on Ex'rs, 411. *Overfield v. Bullett*, 1 Mo. Rep. 749. Constitution of Mo. Art. 13, sec. 17.

Even if the administration had been annulled by the statute, this would not have the effect to invalidate the sale.



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It is said, that the Probate Court is a mere statutory court, and that its proceedings are only to be sustained, upon proof that all the requirements of the law have been complied with. To this, it may be replied, that such court, although not established by the constitution, is provided for by that instrument. See Art. 5, sec. 12. It is established, in pursuance of the command of the constitution, as a court of record, exclusive within its sphere, and with all the powers that are requisite to the exercise of its important jurisdiction. See Code of 1825, p. 270, secs. 6, 16, 17, &c.

It had exclusive jurisdiction, in all cases relating to the "right of administration," "the granting of letters, and repealing the same." It had exclusive jurisdiction over the subject of selling lands of intestates, for the payment of their debts. All its original jurisdiction was exercised, subject to the right of the party to appeal to the Circuit Court.

The proceeding was a proceeding *in rem*, to which all the world are parties, and not a proceeding between parties litigant, and the court having acted upon the petition, and made the order for the sale, that order was the judgment of a court of competent power, upon a subject within its jurisdiction, and its proceeding cannot be collaterally questioned. 10 Peters, 473. 2 Howard, 319. 2 Peters, 157. 11 Serg. & Raw. 425-29-31. 11 Mass. 227. 5 Hammond, 500. 3 Ohio, 553. 4 Dana, 429. 2 Verm. 253. 6 Porter, (Ala.) 219, 262. 3 N. J. Rep. 73. 15 Ohio, 703.

RYLAND, Judge, delivered the opinion of the court.

From the preceding statement, it will be seen that in this cause, the main question depends upon the construction of the act concerning executors and administrators, passed by the legislature of Missouri, and approved February 21st, 1825, which was to take effect from and after the fourth day of July, 1825.

The third section of this act declares, "that no person shall act as executor or administrator, unless he be twenty-one years of age, and upwards, and of sound mind; nor shall

any married woman act as executrix or administratrix; nor shall the executor of an executor, in consequence thereof, be executor to the first executor."

The fifteenth section declares, "that where any *femme sole* executrix or administratrix shall marry, her husband shall not thereby acquire any interest in the effects of her testator or intestate, nor shall the administration thereof devolve on him; but the marriage shall operate as an extinguishment of her powers, and her letters shall be revoked and repealed."

Now, in this case, the administratrix was married before the passage of the law, and the law itself had no effect, until the fourth of July, 1825.

The thirteenth article of the State constitution, section 17, declares, that "no *ex post facto* law, no law impairing the obligation of contracts, or retrospective in its operation, shall be passed by the legislature."

Now, in order to make this "act concerning executors and administrators" operate upon the marriage of the administratrix, in this case, it must necessarily have a retrospective action, which, we have seen, is plainly forbidden.

By the plain and obvious terms of the act, its whole tenor and scope directly and distinctly point to future actions. The last clause of the act itself postpones the taking of effect, until several months shall elapse.

"No person shall act," &c., "where any *femme sole* executrix or administratrix shall marry," &c., all point to the future.

Now, although the marriage of a *femme sole* executrix, after taking out the letters, and before the passage of this law, might afford a sufficient reason for the action of the Probate Court, after the law went into effect, to take steps to revoke and annul the letters, yet, until such action was had by the Probate Court, and an order made revoking them, we consider that such executrix still continues to be *de jure* and *de facto* executrix. So, likewise, with an administratrix.

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We have not the least doubt that the act of 1825 did not reach this administration in this point. It might have been a sufficient cause for the Probate Court to have taken action and revoked the letters of administration; but until such action was had, she was still the administratrix.

The Probate Court was a court of record, and had general and original jurisdiction over the subject of estates, wills, executors and administrators; and we are inclined to suffer its acts to have full weight. We will not disturb the title to real property, acquired under the sales made in pursuance of the orders of the court, and we will not look with a scrutinizing eye into the proceedings of such courts, to find defects, in order to set aside sales of real estates, ordered and sanctioned by such courts.

The second application was but a continuation of the first, for sale of real estate to pay debts, and the Court of Probate having granted an order for such sale, and afterwards approved the acts of the administratrix and her husband, in making and conducting such sale, we feel disposed to let the sale stand unshaken by us.

I am, therefore, for affirming the judgment.

NAPTON, Judge, concurred in the above.

BIRCH, Judge. After taking into view all the facts and circumstances of this case, it is deemed unnecessary to go further in reference to the main point in controversy, than to express the opinion, that the cotemporaneous construction which seems to have been given to the act of 1825, was at least sufficiently reasonable to demand for it, for all the purposes of this case, the recognition and confirmation of this court. That it was generally construed as not reaching the case of an administratrix, who had married before its passage, may be sufficiently inferred (in the absence of any thing to the contrary,) from the facts imported by the record before us, disclosing not merely the acts of the court, in recognition of her continued authority, but the apparent acquiescence of a number of creditors of the estate, and the consequent inferential concurrence

of the bar of that period. These creditors, it is inferred from the statement of one of the counsel for the appellants, either received nothing from the sale of the land in question, or, if they did, it was from the securities of the administratrix. If the former, and the sale had not been *then* regarded as valid, it would seem that some one of them at least would have been found to coterminously dispute the validity of the continuing administration, and by urging then, as now, the invalidity of the sale, have sought the appointment of a new and proper administrator, together with a resale of the property, and an application of the proceeds to the payment of their demands. If the latter, as the securities could only be liable, upon the assumption that the administration was legally continued, the implied acquiescence of one of the oldest and soundest lawyers, who then adorned and yet adorns the bar of this court, (and who was one of the sureties in the bond,) is but additional persuasive testimony that the construction of the court was acquiesced in by the profession. In any point of view, therefore, which now occurs to us, the presumption is a fair one, that the proceedings and sale in question were had and made under such a permissible coterminous construction of the law, as reconciled the most enlightened minds and the most adverse interests of that day — a generation or more ago ; so that it may well be forborne, at this distance of time, and in a case like the present, to discuss, as an *original* proposition, a question, upon the coterminous adjudication of which, rights have been at least honestly and *fairly* acquired, and the divestiture of which, in cases like the present, would be an emphatic private wrong. So far, therefore, as the *right* of administration is involved, it will not be further here considered.

Resulting from the same considerations, a certain degree of forbearance may also be extended to what might otherwise challenge a more critical consideration, namely, the technical ambiguities, inaccuracies and omissions evolved by the record of the Probate and County Courts. It has been but too well

suggested, that were the estates of the country, which have been honestly and openly derived under the sales of administrators, to be subjected to the formal and technical tests which are here urged by the counsel for the appellants, a harvest of litigation, ending in a sea of ruin and of wrong, would be the inevitable consequence. This court, except to palpably *help out* the ends of every day justice, will, perhaps, increase in the reluctance it has heretofore manifested, to insist upon greater precision and formality in the proceedings of the inferior tribunals, than was reasonably to be anticipated in and from the manner of their institution and organization — for such they deem to be the spirit and meaning of the duty, in that respect, devolved upon them.

The record in question sufficiently discloses at least the most prominent and important facts — namely, that it was necessary to sell the land (or a portion of it) in order to pay the debts of the deceased, and that being so sold, it brought a greater sum than that at which it had been regularly appraised. Whether, at that early day, and having reference to the condition of the little lot of land in question, it was most judicious to order it to be divided and sold in parcels, or to be sold altogether, as it was, was then, as it would now be, a question for the sound discretion of the County Court, which we perceive no sufficient evidence to doubt was properly enough exercised in the case before us. The lot seems to have had a house upon it, and for that reason, as well as for others, which may be readily imagined, it may have been deemed best for the estate to sell it altogether. At all events, no sufficient case is made upon the record, to justify this court, at this day, in annulling the sale upon that score.

As to the alleged invalidity of the deed, because of a defect in the certificate of acknowledgment, it is deemed sufficient to remark, that as this suit is substantially between original parties, and as the record discloses the fact that the land was sold by persons representing the ancestor of the one, and paid for by the other, those who would now stand upon the original

seisin of the first, should not be allowed, in order to make that paramount, to take advantage of an omission, which the law would rather ascribe to his administrators as a *fault* than to his heirs as a *merit*.

Similar reasoning might, perhaps, be deemed sufficient as to the apparent incongruity between the report and confirmation of the sale to one of the Lindells and the subsequent execution of the deed to both of them; but were it even otherwise, both reason and authority seem sufficiently conclusive, that such a deed is not, therefore, null, but that it should and will operate in favor of such of the grantees as it *ought* to have been made to, or such an one as *can* take under it; and as in this action, the recovery of the plaintiff is defeated by showing title in any other person, it would seem that in either point of view, the point in question was unavailable to the plaintiffs.

Upon the whole case, therefore, believing as we do, from the general and special considerations to which we have adverted, that the *jus possessionis* attaches to the defendant, instead of the plaintiffs, the judgment of the Circuit Court is affirmed.

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CHILDRESS & MULLANPHY, Plaintiffs in Error, *vs.* CUTTER,  
Defendant in Error.

1. By the custom of Paris or French law, real estate owned by either party at the time of marriage, did not enter into the community.
2. A marriage contract, purporting to create a community according to the custom of Paris, contained this clause: "The said future spouses take each other, with their property and all the rights now actually belonging to them, and also those which may fall to or appertain to them, &c., which property shall wholly enter into the community," &c. *Held*, the words "which property, &c.," must be understood as applicable only to that which came to them during marriage.
3. By the Spanish law, which formerly prevailed in this State, if a husband or wife married a second time, the property which he or she acquired from a former spouse, either directly or by inheritance from any of the children of the first marriage, became the property of the surviving children of the first marriage, and the spouse who married again only had the usufruct of it during life.
4. There was an exception to this general rule, in favor of women becoming widows before the age of twenty-five years. But a widow who claims the benefit of this exception, must prove herself within it; otherwise the case will be determined according to the general rule.



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5. Under the twelfth section of the Territorial act of July 4th, 1807, upon the death of a person who had acquired an estate of one of his parents, the estate descended exclusively to his blood, on the part of the parent from whom it came to him.
6. A certified copy of any record or public paper, by the officer intrusted with its custody, is evidence, if the original would be; but such documents are not evidence of matters stated in them, which do not belong to the transaction which the officer was required to record.
7. Church registers are not admissible in evidence, except by special statute, unless they are, by the civil law of the country or State where kept, recognized as documents of an authentic and public nature.
8. Recitals in such registers are not admissible as evidence of pedigree.

*Appeal from St. Louis Circuit Court.*

THIS was ejectment, in the St. Louis Circuit Court, brought by Cutter on the 1st of November, 1845, for a tract of one by forty arpens of land in the Common Fields adjacent to St. Louis, stating it to be the same tract formerly conceded to Louis Lirette and by him sold to Jno. B. Vifvarenne, being U. S. survey number 1479 in said Common Fields. Childress was the tenant of Bryan Mullanphy, of a lot of twenty-five by one hundred feet. Mullanphy caused himself to be a co-defendant, and on the 10th of January, 1850, a verdict was rendered against the defendants for two fifteenths of said lot of twenty-five by one hundred feet. A motion was made for a new trial, and overruled; and defendants appealed.

The plaintiff gave in evidence documents as follows:

1st. A concession on 17th July, 1769, of St. Ange to Louis Lirette, of a tract of one by forty arpens of land, situated in the prairie opposite the mound; bounded on one side by widow Mareschal, and on the other by Condè.

2nd. A survey by Duralde, taken from Livre Terrien No. 2, of one by forty arpens, for Louis Lirette, in the prairie that touches the village (St. Louis); bounded on one side by the domain of the king, and on the other by Moreau. This was made between 1770 and 1772.

3d. A conveyance by Louis Lirette before the lieutenant governor, Piernas, to John Baptiste Vifvarenne, dated 20th August, 1774, of one by forty arpens; bounded on one side

by the widow Mareschal, and on the other by the domain of the king or the land of Condè.

4th. A confirmation by the recorder, being the usual tabular statement in his report. The quantity is one by forty arpens, and it states that notice to the recorder was by Lirette's representatives. The decision is in these words, "Confirmed forty arpens to be surveyed."

5th. United States survey No. 1479 of the tract conveyed to Lirette, and confirmed as above; bounded north by Moreau, and south by Mullanphy, under Provenchère, executed on 19th October, 1826.

6th. Certificate of marriage of John Baptiste Vifvarenne and Genevieve Cardinal, on the 6th August, 1777.

7th. Certificate of burial of said Genevieve, on the 2nd of November, 1792.

8th. Certificate of baptism of Louis Vifvarenne, son of J. B. Vifvarenne (spelled Wivaren) and Genevieve, on 15th August, 1780.

9th. Certificate of burial of an infant of "Wivaren," aged fourteen months, on 1st January, 1781.

The plaintiff claimed under sundry deeds from persons representing themselves heirs of J. B. Vifvarenne, and proved that J. B. Vifvarenne died many years before his wife died. He also gave evidence, tending to prove that Louis Vifvarenne, son of J. B. Vifvarenne, left St. Louis about the year 1800, and went to the lower country. He then gave depositions of sundry witnesses, stating, that at about that time, a person answering the description of Louis Vifvarenne, son of J. B. Vifvarenne, came to the parish of St. Landry, near Opelousas, in Louisiana, and remained there till he died, in 1813; that he went by the name of Louis Cardinal, and was generally known only by that name; said he was from St. Louis, and mentioned to a person, on one occasion, that his name was Vifvarenne. Other circumstances were given in evidence, tending to show that he was Louis Vifvarenne, son of J. B. Vifvarenne.



1. The defendants gave in evidence the marriage contract between John Baptiste Vifvarenne and Genevieve Cardinal, dated the 5th August, 1777. It provides, that they will perform the ceremony of marriage, as soon as either requires it of the other: "That the said future husband and wife may be one and common in all property movable and acquisitions immovable, according and in conformity to the ancient custom established in this colony, to which they subject themselves in respect to this contract; the said future husband and wife shall not be bound for the debts of each other, accrued before the celebration of said marriage; and should there be any, they shall be paid by him or her who contracted them, out of his or her property, without the other being responsible, or his or her property.

"The said future husband and wife take each other, with their property and rights actually belonging to them, and that which shall come, descend, or belong to them hereafter, whether by inheritance, donation, legacy, or otherwise; which property, from whatever source it may come to them, shall enter wholly (*par le tout*) into the community, without any reservation."

The contract provides, that said Vifvarenne endows her with the sum of six hundred livres, to be a charge on all his property. It then further provides, that the survivor of them shall be entitled to four hundred livres out of the property of the community.

Defendants also gave in evidence the following:

2. Certificate of baptism of John Baptiste Vifvarenne, son of said J. B. Vifvarenne and Genevieve Cardinal, showing that the ceremony was performed on the 3d of May, 1779.

3. Certificate of baptism of Francis Vifvarenne, also a son of J. B. Vifvarenne and Genevieve, showing that he was born on the 6th of April, 1782.

4. The deed of Toussaint Mareschal and Charles Mareschal (sons of said Genevieve, by Jacques Mareschal by second marriage) to Pierre Chouteau, conveying, as heirs of Gene-

vieve Vifvarenne, their mother, the said one by forty arpens of land, dated 11th October, 1817.

5. The deed of said Chouteau and wife to John Mullanphy, dated 30th October, 1819, conveying to him, in fee, one hundred and twenty arpens, composed of the Lirette field lot, in question in this suit, and the two adjoining on the north; to wit, one in the name of Moreau, and the other in the name of Vien, the original claimants. This deed was acknowledged and recorded, 1st November, 1819.

6. Inventory and appraisement of the property of Genevieve Cardinal, widow of John B. Vifvarenne, and her two minor children. This document is dated 19th August, 1782. It sets forth that it was done by the lieutenant governor, Cruzat, and in consequence of said Genevieve's having left the place. (Plaintiff objected to the admission.)

7. Sale of the property, real and personal, of said Genevieve and her two children, contained in said inventory and appraisement, on the 6th of October, 1782, by the same lieutenant governor, to pay the creditors of said Genevieve.

8. An extract from the parish register of St. Landry, in Louisiana, as follows: "In the year 1813, and the 24th of the month of August, I, the undersigned, Michael Bernard Barriere, priest, officiating in this parish of St. Landry of Opelousas, buried in the cemetery of this parish, the body of Louis Vifvarenne, an adult of about thirty-three years, native of St. Louis, of Illinois, and natural son of Louis Vifvarenne and Margaret Metive. He died from sickness, and at the house of Pierre Bellevue, in the Grand Prairie. He was not married, died poor, and did not receive the sacraments, not being aware that he was going to be sick. He lived in this parish about twelve years."

The present priest of that parish and keeper of its records swears to the above copy, and the custom of the church, to keep such registers, &c. In the margin of the above entry on the parish record, is a memorandum, as follows, in the same

handwriting: "Louis Vifvarenne. He was better known under the name of Louis Cardinal."

It was proved, that the whole entry was in the handwriting of Barriere, then the parish priest, who has since died.

The defendants gave evidence tending to prove, that Genevieve, widow of J. B. Vifvarenne, married Jacques Mareschal soon after the death of Vifvarenne; that the two Mareschals, who made the deed to Mullanphy, were her only heirs: that as early as 1820, at least, Mullanphy built a brick house on the south line of the Vien field lot and north line of the Moreau field lot, being partly on both of those tracts, and surrounded the same by an enclosure, the eastern part of which was on the eastern line of the field lots; that the house stood back from the eastern line a hundred feet, more or less, and the enclosure was extended south, then, or in a year or two after, so as to reach the Lirette field lot and take in a portion of it. The testimony, as to its extent to the south, was conflicting; some witnesses thinking it comprehended the common field lot in question, in whole or in part; and others, that it did not.

9. The defendants also gave in evidence the confirmation, by the board of commissioners, on 18th November, 1809, to John Mullanphy, of two by forty arpens, being the common field lot lying immediately south of and adjoining the south field lot, which is in controversy in this action.

It appeared in evidence, that John B. Vifvarenne had two sisters and no brothers: that one of those sisters married Joseph Labuxiere, and had numerous issue, from some of whom, in the second or third generation, the plaintiff derived title: that the other sister married Sans Souci, and had issue still living, whose title was not in the plaintiff.

It further appeared that Genevieve Cardinal had a number (six) of brothers and sisters, all of whom but one left issue, so that Louis Vifvarenne or Cardinal, who died near Opelousas, if he were the son of Vifvarenne and Genevieve Cardinal, had collateral kindred through his two paternal aunts, and also

through his maternal uncles and aunts, and also left two half brothers, by the mother's side.

The defendants then asked the following instructions :

1. If the jury find from the evidence, that the marriage contract, read in evidence in this case, by defendants, was executed by John Baptiste Vifvarenne and Genevieve Cardinal, at the time of its date, and that the said John Baptiste and Genevieve were immediately thereafter married, according to the stipulations of said contract, at St. Louis, in the year 1777, they will then consider the property owned by said Vifvarenne, at the time of the marriage, as put into and forming a part of the community created by said contract, and that the land in controversy, if it then belonged to him, became, also, a part thereof ; and further, that by virtue of the community so created, the one undivided half of said land, in fee, was the property of said Genevieve, if the jury find that said Vifvarenne died under the Spanish government, in the province of Louisiana, leaving said Genevieve, his widow, surviving.

2. If the jury find that the said marriage contract was made before the lieutenant governor, by said John Baptiste Vifvarenne and Genevieve Cardinal, at St. Louis, in the year 1777, and that thereafter, in the same year, they were married ; and that afterwards, and during the existence of the Spanish government in Louisiana, said Vifvarenne died, and Genevieve, his widow, married Jacques Mareschal ; that she died in 1792, leaving three children by said Mareschal, and one surviving, by her first husband, Vifvarenne ; and that said son, by Vifvarenne, died in 1813 without issue,—then the jury are instructed, that all interest or title in the land in question, belonging to said Genevieve, at her death, descended in equal portions to her said four children, and all the interest and title in said land, owned by her son by Vifvarenne, which descended to him from her, upon his death, passed, in equal portions, to the children by Mareschal, or to such of them as were then living.

3. If the jury find that J. B. Vifvarenne, the father, left

several children at the time of his death, and that he died while the Spanish government existed in Louisiana, then all lands owned by him at the time of his death, and which could descend to his heirs, vested in those children in equal portions; and if such children, or any of them, died before their mother, while the Spanish authority remained in force, then the portion of such child or children passed to and vested in the mother.

4. If Louis Cardinal, *alias* Louis Vifvarenne, was the lawful son of John Baptiste Vifvarenne, and if he died in the year 1813, owning an interest in the land in question, descended to him as heir of his father, without leaving issue, or father or mother or wife surviving, then such interest passed to his collateral kindred; that is, his uncles and aunts, both on father's and mother's side, if any, surviving, and to the issue of such as were dead, in equal portions; such issue to take such portion as their ancestor, the said uncle or aunt, would have taken, if alive.

5. That the inventory and appraisement, purporting to have been made on the 19th of August, 1782, of the property of Genevieve Cardinal, wife of the deceased, John Baptiste Vifvarenne, and of her two minor children, is evidence that she then had two children living, if the jury find the same was executed by the proper Spanish authority, at its date.

6. That the document given in evidence, purporting to be a sale, by the lieutenant governor, of the property of Genevieve Cardinal and her two minor children, is evidence tending to establish the fact that there were two minor children of said Genevieve then living, if the same was duly executed before the proper Spanish authority, at its date.

7. That the document given in evidence, as a certificate of interment, made by Pierre Bernard Barriere, is evidence tending to show that the said Louis Vifvarenne, therein mentioned, was the natural son of John B. Vifvarenne, by Margaret; provided, the jury believe, from the evidence, that the original entry, of which said document purports to be a copy, was made at the time of its date, in the register of the parish, by the officiating

priest of that parish, who performed the burial service on the interment of said Louis.

8. If the jury find from the evidence, that the deed, given in evidence, purporting to be the deed of Pierre Chouteau and wife to John Mullanphy, was duly executed by the grantors therein, at its date, and that it embraces the forty arpent tract, of which the land in controversy in this suit is a part, and that said Mullanphy and those claiming under him have had possession of a part of said forty arpent tract since the year 1819, for twenty years before the commencement of this suit, under said deed, and claiming the whole, then there can be no recovery in this action in favor of the plaintiff, for any share or interest in the land sued for in this action, which, at the commencement of said twenty years' possession, was owned by a person then residing in the Territory or State of Missouri, and not then a minor or married woman.

9. That possession of part of a tract of land, under a deed for the whole, with a claim to the whole, is such possession as will bar the actual owner by a lapse of time under the statutes of limitation, in force from the year 1818 to the present time, in Missouri.

10. That the plaintiff cannot recover in this action, unless it appear, to the satisfaction of the jury, that he, the plaintiff, his ancestor, predecessors, or grantor was seized or possessed of the premises in question, within twenty years before the commencement of this action.

11. That if the jury find, as in the fifth instruction asked by defendants, they are then instructed that said document therein mentioned, as an inventory and appraisement, is evidence tending to prove that John Baptiste Vifvarenne, the father, was dead at the date of said inventory, viz., in the year 1782.

Of the said instructions, the court refused to give all except the eighth and ninth; to which refusal of the court the defendants excepted.

The plaintiffs then asked the following, viz. :

1. If the jury believe from the evidence, that John Baptiste



Vifvarenne left more than one child surviving him, and that said child died before his or her mother, and after his father, and that Genevieve Cardinal was married the second time, to Jacques Mareschal, she was bound, on such second marriage, to restore the inheritance to the children of her first husband, living at the time of such second marriage, if the jury shall believe the premises in question were originally derived from said John Baptiste Vifvarenne, and no estate of inheritance in the case, supposed in this instruction, rested in said Genevieve after she became the wife of said Mareschal. Such is the general rule, and if it is claimed by the defendants, that John Baptiste Vifvarenne died before his wife attained the age of twenty-five years, and that, therefore, she could take from any deceased child or children of the first marriage, the jury are instructed that this is one exception to the general rule; and it is for the defendants to prove the facts upon which the exception is founded; and in the absence of any proof satisfactory to the jury on this point, they will disregard the exception, and find according to the general rule.

2. If the jury believe from the evidence, that John Baptiste Vifvarenne was seized of the premises in question before his marriage with Genevieve Cardinal, and that he died before his said wife, then, upon his death, the estate descended to his heirs; and if the jury believe Louis Vifvarenne was his only surviving child, and that he died in 1813, or about that time, unmarried, and not having had any legitimate children, then the premises went to his paternal kindred; and if the jury believe that the wife of Joseph Labuxiere, the elder, and the wife of Sans Souci, were aunts of said Louis, and his nearest kindred on his father's side, they or their heirs took the estate in exclusion of any brothers of the half blood on the mother's side; and if the jury believe that Pierre Pallardie, Antoine Pallardie, Noel Pallardie, Michael Pallardie, Mary L. Pallardie, and Celeste Thibeau were descendants of said Joseph Labuxiere and wife, and their grand-children; and that Mary Lamarche, Denise Lamarche, and John Baptiste Dorlaque were also de-

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scendants and great grand-children of Catharine, wife of said Joseph Labuxiere, senior, and that Mary Janis, Andrè Beauchemin, Joseph Beauchemin, and Louis Beauchemin were also great grand-children of said Catharine and her husband, Joseph Labuxiere; and that Gabriel Labuxiere, Eugene Labuxiere, Henry Labuxiere, Joseph Labuxiere, Marcellette Letamps, and Odille Letamps were also descendants and grand-children of said Catharine and Joseph Labuxiere, and that deeds, given in evidence from these persons, were duly executed by them and by the husbands of said Marcellette and Odille, to the plaintiff in this suit, they will find for the plaintiff such portion of the premises of which defendant was in possession, as these persons would be entitled to as lineal descendants; and assuming the said Catharine and wife of said Joseph, if she had survived said Louis Vifvarenne, would have been entitled to one half of said premises, that in ascertaining said portion, if they believe Antoine, son of the said Catharine last mentioned, died unmarried, intestate, and without children, the portion he would have taken went to his brothers and sisters and their descendants; that if they believe Charles Beauchemin has been absent from the State more than seven years, and no tidings have been had of him, his death will be presumed, and his share go to his brothers and sisters; and if they believe Louis Beauchemin dead, intestate, and without children, his share went to his wife and brothers and sisters.

3. The inventory and account of sale of the effects of John Baptiste Vifvarenne, or his widow, are not evidence of any facts stated therein, as to the survivorship or number of children of John Baptiste Vifvarenne.

4. The certificate of burial from the parish of St. Landry, Opelousas, in Louisiana, is not to be received by the jury as evidence of the question of legitimacy of Louis Vifvarenne.

5. To enable the defendant to avail himself of the statute of limitations, it must affirmatively appear to the jury, by proof, that his possession of the land in controversy, or of a part thereof, with a claim to the whole, as already stated, or that of



those under whom he claims, commenced and continued, without interruption or intermission, for twenty years before the commencement of this suit, under a deed purporting to convey the legal title thereto; if, therefore, the jury shall believe from the testimony, that defendant, or those under whom he claims, had not such a possession of the land sued for as commenced and continued without intermission for twenty years before the beginning of this suit, under a deed purporting to convey the title thereto, they will find for the plaintiff, on the defence raised under the statute of limitations. Which instructions the court gave; to the giving of which, and each of them, the defendants excepted. The court having refused to give instruction numbered three (3), asked by the defendants, modified and gave the same, with an addition to it, as follows: "That if the jury find that J. B. Vifvarenne, the father, left several children at the time of his death, and that he died while the Spanish government existed in Louisiana, then all lands owned by him, at the time of his death, and which could descend to his heirs, vested in those children in equal portions; and if such children, or any of them, died before their mother, while the Spanish authority remained in force here, then the portion of such child or children passed to and vested in the mother, absolutely, except as stated in the instruction next following": to the giving of which defendants excepted. This instruction was followed by No. 1 of plaintiff's, as explanatory of it.

*Spalding & Shepley*, for appellants.

I. By the marriage contract of John Baptiste Vifvarenne and Genevieve Cardinal, the wife took an interest of one half in the land in question, absolutely. 10 Mo. Rep. 312. *Broussard v. Bernard, et al.*, 7 Lou. Rep. 220. 3 Vol. Recop. lib. 10, tit. 4, law 6. 3 ib. p. 425, lib. 10, tit. 4, laws 1, 2, 3, &c. 2 Coutume de Paris, pp. 2, 3, 40, 41. *Analyse du Droit Français*, p. 654, art. 229, p. 344, 351, 350, 528. 1 *Science des Notaires*, 261, 263, 291. Louisiana Code, Articles 2314, 2315. 17 La. 238. 7 La. 222. 1 White, p. 61, sec. 2. 3 Febrero, p. 117, No. 6, p. 129,

Nos. 23, 24, 25, and 26; p. 138, Nos. 44 and 47; p. 140, Nos. 48 and 49; p. 141, No. 50; p. 153, No. 8.

II. On the death of J. B. Vifvarenne, his half of the property descended to his issue.

1 vol. Febrero, p. 200, Cap. 6, secs. 1, 2, &c., that descendants inherit if there be no will. 1 White, 115 (Asso y Manuel, 120-1-2); 3 vol. Partidas in Spanish, 248 (Post. 6 tit. 13, law 3) to same effect. 4 Febrero, 42, Nos. 17, 18, &c.

III. On the death, under the Spanish government, of any of Vifvarenne's children without issue, their mother, if living, inherited. Such was the general law.

1 Febrero, 89, No. 54, that father and mother, grandfather and grandmother, &c., in the ascending line, are heirs, instead of collaterals. 3 vol. N. Recopilacion, p. 524 (lib. 10, tit. 20, laws 1 and 2. 1 White, 116. Asso y Manuel, 120-1-2.

IV. On the second marriage, if Madame Vifvarenne became a widow over twenty-five years of age, she was bound to restore what came to her from her husband, directly or by inheritance from any of his children, to the surviving children or issue; but this restoration did not take place till her death, as she had a life estate in the property, nor did it then take place in favor of any others than the *descendants* of the first husband.

1 Febrero, 235, chap. 8, No. 1. Ibid, No. 2. 3 Febrero, p. 407, No. 2. Ibid, Nos. 3, 4, and 8. 2 Febrero, 200, No. 1977. Ibid, p. 409-11-12-13. Ibid, p. 408, No. 4. Ibid, p. 203, No. 1993 (L. Lib). Ibid, p. 414, No. 27 & No. 28. 3 vol. Recop. Lib. 10, Tit. 4. 2 Febrero, p. 415, No. 31. 7 Mart. Rep. (N. S.) 655, 668-9. 4 Mart. Cond. Rep. 391. *Deblanc v. Landry*, 6 Mart. N. S. 31. 3 Cond. 732.

V. The first instruction given for the plaintiff below is erroneous: 1st, in asserting that Madame Vifvarenne was bound to restore the inheritance to the children of the first husband, *upon, and at the time of her second marriage*. 2nd, in assuming that no estate of inheritance vested in said Genevieve, after her *second marriage*. 3rd, in assuming that even if all of J. B. Vifvarenne's children died before their mother, that still

the property could not vest in her nor descend from her. 4th, in assuming that a lawful child of J. B. Vifvarenne did survive the said Genevieve; and 5th, in assuming that there must be such restoration of the property, if it was derived from J. B. Vifvarenne, no matter how derived. 6th, in declaring that the restoration must be to the child or children, whether *legitimate* or not. 1 Febrero, p. 200, No. 1, that the *legitimate* descendants inherit, and page 98, No. 69, and illegitimate do not. 7th, in assuming that we, the defendants, were bound to prove an exception to the general law.

VI. On the death of Louis Cardinal, *alias* Vifvarenne (if he was the lawful son of J. B. Vifvarenne and Genevieve, his wife), his estate in the land in question, so far as derived from his mother, went to his half brothers, the two Mareschals; and so far as derived from his father, it went to his uncles and aunts, or their descendants, by both father and mother's side. 1 Terr. Laws, 125, secs. 9, 10, 11, 12, and 14, at pages 130-1. Ibid, page 128, secs. 6, 7.

The twelfth section is a provision applicable to cases where there are *half bloods*, and the question is between them and other claimants of the whole blood, for the sole purpose of excluding *half bloods* of the one side from property descended on the other side. It is not an enactment that property shall descend to those only of kin to a remote ancestor from whom it originally came.

There are no *half bloods* back of the intestate; they are all *whole bloods*, as to him; his uncles and aunts, by mother's side, are *whole bloods*, as much so as on the father's side.

VII. The inventory and appraisement of the property of Genevieve Cardinal, widow of J. B. Vifvarenne, and of her two minor children, and also the judicial sale of the same by the lieutenant governor, in 1782, are, each of them, evidence tending to establish the fact that there were, then living, two minor children of said Genevieve and J. B. Vifvarenne. 1 Greenl. Ev. p. 134, secs. 115 and 116, that entries by persons in discharge of duty, official or professional, are evidence.

3 Barn. & Ald. 890, an attorney had endorsed on a paper that he had served it; after his death, held that this was evidence of service. Buller's *Nisi Prius*, 282, an entry of a book-keeper, deceased, admissible. 10 East. 109; 1 Esp. 328; 6 Mees. & Wells, 153. In 10 East. above, it was held that the account book of the surgeon proved the day of birth of the child. 8 Wheat. 326, memorandums made in the course of business, are evidence; *a fortiori*, the acts of a public officer are admissible; 1 Greenl. Ev. 134, secs. 115, 120. The opinion of Le Blanc, J., at p. 120, in 10 East. is to the point.

VIII. Said inventory is also evidence, that J. B. Vifvarenne was dead, at its date, and therefore the eleventh instruction of defendants should have been given. The inventory was officially and formally made before the lieutenant governor.

1. The bare fact of its existence, so made and found among the records of the country, proves the *right* and *duty* of the governor to make it.

2. Being a legal and official act, credit is due to it. 6 Pet. 724, 728, 729.

3. The authorities referred to, under the next head, show that said document was proper evidence of matters of *pedigree*, and *pedigree* embraces the fact of *death* as well as *birth*, &c.

IX. The certificate of interment of Louis, by the parish priest, stating that he was the *natural* son of his father, *Louis* Vifvarenne, and a half breed woman, named Margaret, is evidence tending to prove that he was an illegitimate child; and the seventh instruction of the defendants should have been given. 1 Greenl. Ev. 117, secs. 104, 105, 107, "Pedigree embraces not only *descent* and relationship, but also the facts of *birth*, *marriage* and *death*, and the *times* when these events happened. Also, identity, 5 Har. & John. 51, at p. 55-6. 4 Mason 268, recital in a deed, other than a family deed, corroborated by possession, admitted to prove heirship: Hubback, 514, 516, 517, 518, 519, 653, &c.

Depositions of deceased witnesses, taken between other par-

ties, and with whom the new parties are no way privy, may come in as hearsay evidence of pedigree : 4 Wash. C. C. 186. 3 Wash. C. C. 243.

8 John. 128, 131, 5 Cowen, 237, hearsay of those not *relatives*, is admissible to prove pedigree. 1 Harr. & McHenry, 281 ; 5 Har. & John. 51 ; 1 Wash. 124 ; 2 Hen. & Mun. 193. 10 Pick. 515, letters of administration prove death. 15 John. 226, birth and marriage proved by town records of another State.

*W. L. Williams*, for respondent.

I. The first point raised by plaintiff below is this : The premises in question being the sole property of Vifvarenne, at the period of his marriage with Genevieve Cardinal, on the dissolution of the community, by his death, the land descended to his children.

The marriage contract between those parties did not at all change the then existing law, so far as this property was concerned. The law then prevailing has been well laid down by this court, and settled in Louisiana : *Dawson v. Ripley*, 17 La. Rep. 238. *Picott's case*, 10. Mo. R., 312.

II. Upon the death of Louis Vifvarenne, this estate went to his paternal relatives, to the exclusion of his brothers and sisters of the half blood. He died in 1813 or 14, and the succession must be determined by our territorial act, 1807 : 1 Vol. T. L. p. 130, particularly secs. 12, 14.

The Mareschals are excluded from inheriting from Louis Vifvarenne, the property that came to him by his father. In *Deu v. Jones*, 3 Halsted, 340, where statute is similar, court held the construction contended for. His aunts, Mesdames Labuxiere and Sans Souci, or their descendants, would take the estate.

III. The third instruction asked by defendants, and given, and the first asked and given, on the part of the plaintiff below, embrace this proposition.

That if more than one child survive the father, and one of these die before the mother, she would inherit, unless she had

married the second time, not being a widow under twenty-five years of age, in which case she was bound to restore the inheritance coming from the first husband, to his surviving child or children. If, at the time of the death of any such child, the mother were married, she could not inherit, but his portion descended to or passed to his surviving brother or brothers and sisters.

The general rule of descents, under the Spanish law, and usually in countries adopting the civil code, is not disputed. The estate goes, first, to descendants; in default of them, to ascendants, and if no relatives in the ascending line, then to collaterals. In the case supposed, the mother would have inherited, if she were under no disability, created by the laws of Spain. She was, however, married the second time, was twenty-five years old, and not a widow, under twenty-five, in 1784; and if the youngest child (François) survived his father, he was, in all probability, dead before this second marriage. If so, upon her marrying Mareschal, she was bound to restore the inheritance, and by law it became and was vested in Louis, the only surviving child. The authorities cited, leave no doubt, it is submitted, as to this rule of the Spanish law. 3 Mart. R. 446. 6 ib. N. S. 38. 7 ib. 665. Ib. 10 tit. 4 Lex. 7 White's Compilation.

The second instruction given for plaintiff below, however, presents an exception to this rule, and correctly states the *onus probandi*.

It has been said, that this rule related only to *arras*, and not to property *inherited*. For the rule as to *arras*, as well as other property, see the citations from the Institutes of ———, translated by Judge Johnson, of Trinidad, and found in White's Compilation, from which the references are made.

IV. The instruction given, as to the effect of the inventory and account of sale of the property of the widow, was correct.

V. The certificate of burial, from the parish of St. Landry, Opelousas, was not admissible for any purpose; much less could any statement affecting the legitimacy of the decedent,



contained in said certificate, be admitted. This comes from the State of Louisiana, and is not even shown to be evidence there. Before a paper of this kind, from a foreign State, can be read (if it ever is admissible), it must be proved that, by the law of the State or country whence it comes, such certificate is evidence. Our statute applies only to such evidence within our own State, and the admission of foreign certificates rests upon the general common law rules of evidence. Hubback, 492.

SCOTT, Judge, delivered the opinion of the court.

1. It was maintained in argument by the appellants (defendants below,) that by the marriage contract between J. B. Vifvarenne and Genevieve Cardinal, she, the wife, took an interest of one half in the land in question, absolutely. By the Spanish law, which prevailed here at the time of this marriage, by mere operation of law, without any stipulation or agreement, a community or partnership was established between husband and wife of all their estate, both real and personal. At the dissolution of this partnership by death, after the payment of the debts incurred during its existence, the survivor took back the property he or she had at the time of marriage, and the share of the deceased went to his or her heirs. If it was real estate, it was taken in kind, and in value, if personal estate. By the custom of Paris, or French law, as it is called, a like community was created with regard to the personal estate of the husband and wife; but the real estate owned by either party, at the celebration of the marriage, did not enter into the community. The words of the contract of marriage, that "the said future spouses shall be one and common in all goods movable and acquisitions immovable, according to the ancient custom established in this province," if interpreted according to their literal acceptation, create no community with respect to lands owned at the celebration of the marriage. They contain the sense and meaning of the "ancient custom," and must be construed in reference to it. The 220th article of the Custom of Paris says, "*que homme et femme conjoints ensemble par mariage, sont communs en biens meubles et conquets immeubles faits durant le*



*mariage.*" If they contracted with reference to the custom of Paris, and if, by that custom, immovables owned at the time of the celebration of the marriage did not enter into the community, the ground is not perceived on which those words can be construed as a stipulation that such lands should be divided as partnership property, at the dissolution of the community. It was certainly competent for the parties to make such an agreement, but, to say that it was done, we must maintain that they made a contract contrary to that which they declared they were making.

2. Another stipulation in the contract is, that the said future spouses take each other, with their property and the rights now actually belonging to them, and also those which may fall to or appertain to them, as well by inheritance, donation, legacy, or otherwise, which property, in whatsoever manner and from whatsoever source it may accrue, shall wholly enter into and become a portion of the aforementioned and agreed upon community of property, without any reservation. By the custom of Paris, "*Tous les immeubles, que les conjoints possèdent avant la célébration du mariage, soit propres soit acquets n'entrent point en communauté, sinon pour la jouissance; mais les acquisitions d'immeubles faites devant le mariage y entrent.*" Law of Notaries, 1 vol., 246-7. As the marriage contract was made with an eye to the custom of Paris, and as by that custom lands owned by the parties at the celebration of the marriage did not enter into community, the words "which property," in the above clause of the marital contract, must be understood as applicable only to that which came to them during the marriage. The argument, which has been made in relation to the other words of the contract, applies to the clause now under consideration. Under this view of the subject, on the dissolution of the community, by the death of J. B. Vifvarenne, the entire lot in controversy descended to his heirs.

3. By the Spanish law, which formerly prevailed here, if a person, who marries a second time, has children of his or her

preceding marriage, he or she cannot, in any manner, dispose of the property given or bequeathed to him or her by the deceased spouse, or which came to him or her from a brother or sister of any of the children which remained. This property, by the second marriage, becomes the property of the children of the preceding marriage, and the spouse who marries again only has the usufruct of it. But if the children and their forced heirs die before their parents, the property so inherited by them belongs to the surviving parent. *Lablanc v. Landry*, 7 Mar. Lou. N. S. 665.

4. An exception to this rule was created in favor of women becoming widows before the age of majority, which was twenty-five years, although they should marry a second time. *Duncan's Ex. v. Hampton*, 6 Martin's La. Rep. N. S. 31. The general rule being against second marriages, on principle, the widow must show herself within the exception. This rule is of universal application in criminal and civil cases, and no reason is perceived which exempts this widow from its operation. Even in drawing an indictment of a capital offence, an exception not in the enacting clause of a statute need not be negatived, but the party relying upon it must show himself entitled to its protection. Numberless other instances might be enumerated, but this is deemed sufficient.

5. By the ancient Spanish law of succession, which once prevailed here, where there were no descendants, the ascendants were preferred to the collaterals. The father and mother succeeded to their child in preference to brothers and sisters or other collaterals. 2 Cond. Lou. Rep. 330. 2 Partidas, 1099, 1100.

Under the Spanish law, illegitimate children could not inherit the estate of their fathers or grandfathers, nor other relations descending from them. 1 Partidas, 551.

The twelfth section of the act 4th July, 1807, enacts, that there shall be no distinction in the distribution of any intestate's estate, between kindred of the whole or half blood, unless when the inheritance came to the said person so seized by descent,

demise, or gift, of some one of his or her ancestors, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance.

Louis Vifvarenne dying in 1813, and having received the land by descent, from his father, his estate, under this law, descended to his blood on the part of the father. The law intended that the estate should continue in his blood from whom it was originally derived. Brothers of the half blood being nearer in degree than uncles and aunts on the part of the mother, and they being excluded, there can be no pretence in saying that maternal uncles and aunts are let into the inheritance. They are no more of the blood of the father, J. B. Vifvarenne, than the brothers and sisters of half blood on the part of the mother; and to maintain that they should inherit, when brothers of the half blood were excluded, would overturn all our notions of the canons of descent. Besides, by the fourteenth section of the act last recited, brothers and sisters are preferred to any kindred more remote than they are. If more children than one survived their father, Vifvarenne, and died before their mother, his inheritance would descend to her, if she became a widow under twenty-five years of age; otherwise, she would only have the usufruct of it during her life, and on her death it would go to her son by Vifvarenne, because it came by descent from his father.

6. It may be taken as an established principle of law, that a certified copy of any record or public paper, by the officer entrusted with its custody, is evidence, if the original would be. Copies of the registries of marriages, births, and burials, are evidence of what they purport to record: namely, that certain persons, there described, were married, born, or buried, at a particular time or place, but they are not evidence of any other facts inserted in them, as of the time or place of the birth of an infant. 2 Phil. 284. An entry in a register of christenings, stating the year of the birth, is not evidence in support of a plea of infancy; and the mere entry of christening, unaccompanied by any evidence showing that the person was young at the time

of christening, does not prove the fact of birth in the parish. 1 Phil. 410. So Greenleaf, speaking of entries made in discharge of official duty, says, that, to be admissible, they must be such as it was the person's duty to make, or which belonged to the transaction as part thereof, or which was its usual and proper concomitant. They must speak only to those things which it was his business or duty to do, and not to extraneous and foreign circumstances. Section 115.

We are not familiar with the old Spanish law with respect to the inventory, appraisement, and sale of the effects of deceased persons. Under our law, the mention of the wife and children would be unnecessary and irrelevant. But these official acts, preserved, as they have been, would seem to be evidence of what was required under the Spanish law. We may presume, that the officers under that law acted as they were required, where it does not appear to the contrary. *United States v. Percheman*, 7 Pet. Rep. 51. If so, there would be no violation of the principles above stated, in receiving them as evidence of the facts stated in the fifth and eleventh instructions of the defendant below. As letters testamentary are evidence of the death of the intestate, there would seem to be no impropriety in permitting the inventory and appraisement, under the Spanish law, to have the same effect.

7. With regard to the certificate of the burial of Louis, there is more difficulty. In England, where there is an established church, recognized by law, which had authority to legislate with respect to parochial registers of births, deaths, &c., the domestic registers of that kingdom, made and preserved by the clergy of the established religion, were deemed authentic, and copies of them, duly proved, were always admissible. But registers kept by dissenters were not deemed authentic; nor were foreign registers so treated, unless the law was shown which authorized them. In this state, where there is no religion established by law, all church registers, like those of the dissenters in England, and foreigners, are unauthentic and not regarded as public documents in our courts. This would seem to be the principle when uninfluenced by statute. In order to

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give in evidence an examined copy or certified extract from a foreign register, it would appear to be necessary to prove that the register is, according to the law of the country, a document of an authentic and public nature. Hubback on Evidence of Succession. Dissenters' registers and the registers of burials in a foreign convent were rejected, when offered in evidence of the death of a person. *Ib.* 161. The act of 17th January, 1831, is the first which makes registers of births, &c., kept in pursuance of the rules and ordinances of the churches and religious societies in this state, evidence. We do not see, upon reference to our books of reports, that any question arose as to the admissibility of registers before the passage of this act. The authenticity of registers kept in Louisiana, by the Catholic church, is not shown. We should presume the law to be, in that state, as it would be here without any statutory enactment, as she has no church established by law. It is true, that the priest of the parish of St. Landry testified that the church enjoins the keeping of such registers, but still it does not appear that they are recognized as authentic by the civil law of the country. An act of the 10th April, 1811, requires the judge of the parish to keep a register of births and deaths, and prescribes what they shall contain. Bullard & Catry's Dig. 1 vol. 44.

It seems that the admissibility of the facts recited in these registers, should depend upon the terms of the authority by which they are required to be kept. The question upon them will be, what facts are required to be stated? In this case, the priest testified, that it is required by the rules of the Catholic church, that the parentage of the deceased should be stated in the register of deaths. So, the act above cited, of the territory of Louisiana of the 10th April, 1811, directs that the records shall contain, as far as the same may be ascertained, the Christian names, profession, and residence of the father and mother of the deceased, and the place of his or her birth. From the testimony in the cause, it would appear that the same requirements are exacted by the Catholic church from the priests in that state.

In every parish in Spain, the vicar or curate, or if there be

none, the rector, is charged with the care of the parochial archives. The register of deaths contains the name, age, birth-place and parentage of the deceased; the day of death, place of residence, whether married or single, and to whom married, and whether testate or intestate. Hubback, 520. In France, the registration of births, deaths, and marriages is committed to the civil power, and great care is taken to insure the accuracy of these records. The entries contain more particulars than are required in most other countries. Ibid.

8. The ground is not perceived on which this certificate is admissible as evidence of pedigree. It may be conceded, that death, marriage, birth of a child, dates of these events, age, legitimacy, relationship generally, are provable by hearsay, on questions of pedigree. So, the recitals of these facts in family deeds may be evidence on such questions. Hubback, 649. Ibid, 69. Hearsay, admitted as evidence in questions of pedigree, must proceed from relatives. Ibid, 652. Greenleaf, 103-4. Evidence of the declarations of a clergyman, as to the fact of marriage, has been held to be admissible; so of those of midwife. Hub. 655-6.

The first instruction of the plaintiff below did not state the Spanish law correctly, in saying that the widow should restore the inheritance to the children of the first husband living at the time of such second marriage, because, by that law, the widow had the usufruct of the inheritance during her life, notwithstanding her second marriage. It is not perceived, however, in what manner this error could affect the verdict. The error seems to have been an immaterial one, as the usufruct for life of the widow ceased, by reason of her death, in November, 1792.

The court should not have given the third instruction asked by the plaintiff below, nor have refused the fifth, sixth, and eleventh asked by the defendants.

Judge Ryland concurring, the judgment of the court below is reversed, and the cause remanded. Judge Gamble not sitting in the cause.



## GUION, Respondent, vs. GUION'S ADMINISTRATOR, Appellant.

In an action by a child against the administrator of his deceased mother, for money received by her in the capacity of guardian, the administrator will not be allowed to set up a claim for the support and education of the child by the intestate, when there is no evidence that she ever intended to make a charge therefor.

*Appeal from St. Louis Circuit Court.*

C. B. Lord, for appellant, contended that a mother is not bound to support her infant children, when they have property of their own, no matter what her circumstances may be, though it is otherwise with the father. Cites, 4 Kent's Com. 191. Reeve's Domestic Rel. 324. *Dawes v. Howard*, 4 Mass. 97. *Whipple v. Dow*, 2 Mass. 415. White's Leading Cases in Equity, found in vol. 70, L. Lib. p. 158, note and cases cited. *Hughes v. Hughes*, 1 Brown's C. Rep., Perkins' edition, p. 387 and note. *Burnett v. Burnett*, 1 Brown C. R. 178. *Pulsford v. Hunter*, 2 ibid, 416. *Haly v. Bannister*, 4 Madd. ch. 146. *Bostwick's case*, 4 J. Ch. R. 104. *Greenwell v. Greenwell*, 5 Vesey, 194.

The mother is not entitled to the service of her son, and is not bound to support him. 4 Binney's Pa. Rep. 487.

Cites further, *Reeves v. Brymer*, 6 Ves. 425. *Sherwood v. Smith*, 6 Ves. 454. *Ex parte Petre*, 7 Ves. 403. *Sisson v. Shaw*, 9 Ves. 285. *Maberly v. Turton*, 14 Ves. 499. Notes to *Partington's case*, 3 Brown C. R. 60.

If Mrs. Guion expended money in the maintenance and education of the respondent, for which an allowance would have been properly made, upon a settlement of her accounts in the Probate Court, then such allowance ought to have been made in the Circuit Court. Hood on Executors, 154. 5 Rawle, 331. *Lee v. Brown*, 4 Ves. 369.

In *Ambler, Executor, v. Macon*, 4 Call, it appears from the statement of the case, p. 610, that the mother had not charged her children with board, yet the court, in that case, held, that



whether the mother in her life-time charged the children with board, or not, it will be allowed to the estate, after her death.

The court improperly allowed interest on the demand. 1 Munford Va. Rep. 119. 5 Rawle, 323.

*Lackland & Jamison*, for respondent.

The instruction asked for by the appellant was properly refused :

1. Because it was not applicable to the case ; for even if it had been shown that she expended money in her capacity of guardian, the instruction was properly refused, on the ground that there was no offset filed in the case.

2. Because it did not apply to the case ; for there was no evidence, showing or tending to show, that Josephine Guion expended any money for said respondent, in her capacity of guardian ; and even if she had expended money in that capacity, the only way in which she could obtain credit for it, was by settlement in the County or Probate Court, as in pursuance of an order of said court. See Revised Code, 1835, page 295, section 10, under the head of Guardians and Curators. Also, sec. 8 of said act.

A guardian is merely an officer of the court. See 2 Story's Equity, page 772, section 1338 (5th edition.)

A guardian can do no act affecting the person or property of a minor, unless under the express or implied direction of the court. See 2 Story's Equity, page 785, section 1353 (5th edition.) *Forster v. Fuller*, 5 Mass. Rep. 299 ; 6 Mass. Rep. 58.

Without the express sanction of the court, a guardian will not be permitted, of his own accord, to break in upon the capital of the ward. See 2 Story's Equity, p. 790, section 1355 (5th edition.) *Walker v. Wetherell*, 6 Vesey Rep. 474. *Dawes v. Howard*, 4 Mass. Rep. 99. Leave of court must be first given.

3. If Josephine Guion expended as much money for the support, maintenance, and education of the respondent, while he was a minor, as she received in her capacity as guardian, it

does not follow, as an inevitable consequence, that the respondent is entitled to recover in this suit.

4. Said instruction, asked for by the appellant, was properly refused; for the instructions which the court gave, on its own motion, stated that the estate of Josephine Guion was entitled to credit for all money *shown to have been expended* by her in her said capacity of guardian, for the necessary and proper education, support and maintenance of the respondent.

Where the mother is guardian of her child, and she supports and educates said child, suitable to her condition in life and pecuniary circumstances, and she does not make out and present to the proper court her accounts as guardian, charging said child for said support and education, or with money expended for said purpose, it is a fair, reasonable and legal presumption that she supported and educated said child in her capacity of parent, and not of guardian. And the presumption is much stronger where she makes no charge or entry in her own books for said support and education, and where she does not obtain an order from the proper court, appropriating the money or property of said child for said purpose; and where she is guardian of another child, and she supports and educates her without charge.

Parents are bound to support their children, and they are entitled to the earnings of said children. See *Benson v. Remington*, 2 Mass. Rep. 115. *Nightingale v. Withington*, 15 Mass. Rep. 263. *Plummer v. Webb*, 4 Mason's Rep. 382. *Burlingame v. Burlingame*, 7 Cow. Rep. 93. And they are bound to furnish them with necessaries. *Van Valkinburgh v. Watson, et al.*, 13 Johns. Rep. 480. *Forsyth v. Gouson*, 5 Wend. Rep. 563.

When the parent is able to support the child, the court will withhold an allowance out of the infant's estate. See *Hillsboro v. Deering*, 4 New Hampshire Reports, 86. 2 Story's Equity, page 788, section 1354 (5th edition.)

Where a father is able to support his child, he cannot charge

for his maintenance and education. *Harland's case*, 5 Rawle's Rep. (Pa.) page 330.

The mother, after the death of the father, is bound to support her children, if of sufficient ability. See *Dedham v. Natick*, 16 Mass. Rep. 139, 140. *Nightingale v. Withington*, 15 Mass. Rep. 263, top page, 274 side page. *Bainbridge v. Pickering*, 2 Wm. Blackstone's Rep. 1325. In the case of *Whipple v. Dow, et ux.*, 2 Mass. Rep. 418, Sedgwick, Judge, in his opinion, says, "If a mother support her child gratuitously and without any intention, at the time, of demanding a recompense, nothing is more clear than that she could not, upon a change of inclination, afterwards have an action therefor."

Interest was properly allowed. It is the duty of the guardian to loan out the money of the ward.

SCOTT, Judge, delivered the opinion of the court.

This was a claim, exhibited in the Probate Court of St. Louis county, against the appellant, in which the appellee, recovering less than he claimed, appealed to the Circuit Court, where, on a trial anew, he recovered judgment against the appellant for \$1427 10, the amount claimed and interest, from which judgment the appellant appealed to this court.

Josephine Guion, the intestate, was the mother of the appellee, and was appointed his guardian; in which capacity, between April, 1836, and October, 1837, she received from the estate of Madam Hebert, the grandmother of the appellee, the sum of \$1005 17. Hebert Guion, the father of the appellee, died in 1833, and Josephine, his mother, in 1843. The appellee was about nine years old at his father's death. Josephine Guion, the intestate, inherited an estate from her father, after the death of her husband, which yielded her an income of four or five hundred dollars a year. She had three children—two daughters and the appellee. One of the daughters married in 1834, and the other in 1841. She educated the appellee at the St. Louis University, where he continued three years as a full boarder, and one year as a half boarder. The expense of send-

ing a youth to the University was two hundred and fifty dollars a year. Josephine Guion never kept any account with her son, the appellee. Nor did she ever charge herself, as guardian, with the money received for him from his grandmother's estate. She never made any settlement as guardian. The court excluded, as evidence, a receipt given by the appellee to the appellant for \$1804, a distributive share of his deceased mother's estate. The appellant administered on Josephine Guion's estate. On the trial by the court, without a jury, a verdict was found for the appellee for the amount of his claim and interest. The appellant filed no set-off to the demand, but claimed that it had been extinguished by reason of the expense incurred by Josephine Guion for the appellee.

The cases in England, on the question of an allowance for past and future maintenance by a mother or father to a child, have arisen when the child has a fortune, and on the direct application to the proper tribunal by the parent. The case of the matter of Bostwick, 4 J. Ch. R., is the application of a mother for an allowance for part maintenance of her child. The law seems now to be well settled, both in this country and in England, that applications of this sort will be entertained by the court having the management of the estate of wards and the care of their persons. Each case is governed by its own circumstances. If the estate of the child will warrant it, and the father is poor, an allowance will be made for its support, according to its expectations, and this without regard as to whether it is for past or future maintenance. When the father is of sufficient ability to support his child according to its expectation in life, he will not be allowed for its maintenance. The rule seems not to be so rigorous with respect to mothers. 2 Kent, 191.

By the common law, the father is bound to support his minor children ; and so long as he does, he will be entitled to their services. On the death of the father, this duty and right devolve on the mother, as succeeding to all the duties and obligations of her husband. The seventh section of the statute of

forty-three of Elizabeth, makes the father and grandfather, mother and grandmother, and the children, being of sufficient ability, of every poor person not able to work, liable for his support. This statute, although not in force here (its details making it local to England,) yet has been regarded as a recognition of the principles of the common law.

In the case of *Cummins v. Cummins*, 8 Watts, 366, which was a suit brought by a mother's administrator against a child, and in its circumstances much like this, the court says, "The presumption, from a mother's maintenance of her child, whatever be the means of either, is, that she furnished it as a gift. If the child has nothing to recur to, the presumption is irresistible; and if it even has an estate, her omission to have it applied by a guardian is equally so. Perhaps one case could not be picked out of a thousand, in which the presumption would not accord with the fact. They who would set bounds to the generosity of a mother, know but little about the impulses of such a parent." We fully adopt the opinion of the court in Pennsylvania, not considering it as precluding a mother from an allowance for past maintenance, under circumstances in which it would be proper to give it. In the case of *Whipple v. Dow, et ux.*, 2 Mass. 418, it is said, "If a mother support her child gratuitously, without any intention, at the time, of demanding a recompense, nothing is more clear than that she could not, upon a change of inclination, afterwards have an action therefor." This principle is necessary to secure to children the little patrimony they may inherit. Were mothers permitted to charge for support, as a matter of course, after it had been gratuitously bestowed, it is easy to see that the estate of every child, by a former husband, would be at the mercy of a step-father, and the children of a mother surviving her husband, at the mercy of an administrator. The question in this case is, not whether the mother might not have applied to the court and had her son's estate appropriated for his support, but, whether her administrator shall be allowed to set up a claim for the support and education of her child, bestowed on him by

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herself, when there is no evidence that she ever intended to make a charge for them. It does not appear when Madam Guion was appointed guardian of her son; and her omission to render an account for the sums received for him, cannot be construed into a purpose to apply them for his education. As the evidence of her having received the money was of record, had such been her intention, she would have kept an account with her son, or, at least, have charged him with the sums she expended in his education.

We are aware, that any general rule that may be established in relation to this matter, may sometimes have a harsh operation. That is a frailty incident to all general principles. Under its cover an illiberal child may assert a claim against a deceased parent's estate, to the injury of his brethren, which may expose him to the imputation of a want of generosity. For the honor of our nature, we trust such instances will be rare. But it is better to bear with such cases than to place the patrimony of orphan children at the mercy of step-fathers and the administrators of their mothers.

The other Judges concurring, the judgment will be affirmed.



PETERS, *et al.*, Plaintiffs in Error, *vs.* CARR, *et al.*,  
Defendants.

1. Particular words in a will, if possible, will be so construed as to harmonize with the general intent of the testator, as collected from the whole will.

*Error to St. Louis Circuit Court.*

THIS was a petition for partition. The rights of the parties depend upon the will of William C. Carr. The following is a copy of the clause affecting the questions decided:

“In making a will, I am influenced by the desire to effect two objects:



“The first of which is, to provide a suitable support for my wife and minor children, during her widowhood and their minority.

“Secondly. To make an equal division, at suitable periods, of the balance of my estate amongst all my children.

“To effect the first, without doing injustice to any, is with me the main difficulty to overcome. With these objects in view, I make and publish the following, as my last will and testament, to wit :

“*First.* That there be annually set apart, in the first instance, a sufficient sum for the support of my wife, during her widowhood, and my minor children, including their schooling and education, out of the revenue from my estate ; and should the income of my estate not be sufficient for that purpose, then out of any money on hand, or debts that may be due the estate ; but, as before observed, what should be the amount of this sufficient sum, is a subject of much embarrassment to me. Confiding, however, greatly in the prudence and discretion of my wife, in the economical disbursement of this fund, and judging from the average annual amount of my family expenses, I suppose two thousand dollars will be ample for this object.

“*Second.* Should my wife not choose to remain in my present dwelling-house, my executors are directed to build her one, on any ground I may own (or rent her such an one as she may choose,) with as much ground or land attached to it as she may wish.

“*Third.* If she prefers remaining in my present dwelling, but not to occupy all the land attached to it, then my executors are directed to set apart so much thereof as she may choose to occupy, and lease the balance as my other real estate is leased, in the three Additions made to the city by me.

“*Fifth.* After the election of my wife, as hereinbefore provided for, is made, my executors are directed to make an inventory of everything that may remain, and have it appraised, and the personal property sold, as the law directs, and out of the proceeds of such sales shall be set apart so much as to com-



ply with the provision in the first article of this will, for the immediate support of my wife during her widowhood and minority of my younger children, provided the interest of what money I may have out, and the general revenue of my estate, be not adequate to that object.

“*Sixth.* Whatever amount may remain of the proceeds of my personal estate, interest of money, cash on hand, or general revenue of my estate, my executors will proceed to divide equally amongst all my children, paying to my three married daughters, Anne M. Peters, Virginia E. Cabanne, and Cornelia C. Dyer, immediately, whatever may be their shares, if anything; and the shares of the minor children to be put out at interest by my executors, under the direction of the probate court. Similar dividends and distributions they will continue to make annually, so far as assets may be received, until the accounts of the estate are closed.

“*Eighth.* Having commenced the system of leasing, instead of selling lots, in my several Additions to the city of St. Louis, my executors are directed to continue that system, in the three Additions to the city made by me, until my youngest child, Eugenia, shall be of age or get married, at which time, if not sooner, my will is, that all my estate, of every description, be equally divided between all my children, deducting from the share of each such sums or advances as they may have had, either from me, in my life-time, or my executors, after my death; also, a sufficiency to support my wife.

“*Eleventh.* The balance of the land at Rock Point, that I own in my own right, derived from the children and heirs of Judge Bent, as well as the west end of the tract on which I live, being west of the last Addition to the city made by me, and adjoining the Presbyterian burying-ground, my executors will proceed to sell on a credit of one, two, and three years, with lawful interest from date of sale, secured by deed of trust; or lease the same according to directions in a preceding article. To effect this they will, immediately after my death, if not done before, cause streets to be run through it, and lay it off into

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lots and alleys, in such a manner as they may deem best. The tract of land now enclosed with a high plank fence, and including my residence, servants' houses, coach houses and stables, and extending from Eighteenth street to Twenty-first street, as well as the piece next to the burying ground, has been regularly laid out into blocks, and the corner stones of the blocks and alleys all placed and set, except where prevented by buildings or ponds of water, and the plats duly recorded.

“*Sixteenth.* If, at any time, it seems in the opinion of my executors to be necessary to sell any of my real estate that is directed by a former article to be leased, to meet the provisions of my will, they are directed to make sales of such portions of my real estate, from time to time, as to them shall seem to be necessary.”

The petition states, that said Wm. C. Carr left nine children, of whom Ann, wife of Ralph Peters, aged about thirty-nine years ; Virginia, wife of John C. Cabanne, aged about thirty-four years, and Cornelia, wife of Thomas B. Dyer, aged about thirty-two years, and the plaintiffs, are the eldest, being children of a first marriage ; the defendants are the widow and her children, (all of whom are minors,) and the executors of said Carr. The widow renounced, in due form, the provision made for her by the will, and all that portion, by far the greater part of the will, has failed.

The defendant, Barlow, and the defendant, Dorcas Carr, in their several answers, set up, in substance, that by the will no partition can be made of the real estate, until the youngest child, Eugenia, arrives at the age of twenty-one years, or is married, and refer to the eighth clause of the will, as authorizing that conclusion. The answers say that the intention of the testator, as apparent on the will, was, that there should not be any partition, unless in the event of the death of the said Eugenia, who is now between four and five years of age. The case must be determined upon a construction of the will, and any further statement is not deemed necessary.

*R. M. Field*, for plaintiffs in error.

I. The will, on its face and supposing its provisions to be all now effectual, does not take away the right of partition.

1. The *first* clause has no such effect; for obviously partition may be had subject to the charge of \$2000 thereby created.

It is a familiar practice in equity to make partition of land subject to incumbrance. *Wotton v. Copeland*, 7 J. C. R. 140.

So where a widow is entitled to a "living" out of real estate, partition may be made *subject to her rights*. *McClinton v. Mouns*, 4 Munf. 328.

Nor is it any objection that the premises are under lease: the partition or sale must be had in subordination to the lease. *Woodworth v. Campbell*, 5 Paige, 518.

And it is no objection to partition that the estate may prove insolvent. This would be effectual only to prevent a sale. *Matthews v. Matthews*, 1 Edw. 565.

2. The eighth clause of the will does not stand in the way of partition, because,

a. The power of leasing there spoken of, is to continue only till partition is made.

b. And the power to lease, or leases subsisting in fact, cannot prevent partition. *Woodworth v. Campbell*, *ubi supra*.

3. The eleventh clause of the will cannot have the effect to bar partition; for it is the well known rule of equity, that when land is directed to be sold, and the proceeds paid to a person, that person is always permitted to take the land without a sale, if he so elects. *Craig v. Leslie*, 2 Story's Eq. Jur., section 793. 3 Wheaton's Rep. 563.

In the present case, the will directs the land to be subdivided and sold in separate lots. If the defendants desire a sale, it obviously may be effected by the proceedings in partition, to the extent of their interest.

II. But the main object of the testator, as expressed in his will, has been frustrated by the renunciation of the widow;

and to carry out, literally, the provisions of the will, would be to apply the intention of the testator to circumstances not in his contemplation.

1. The first seven clauses have reference to the keeping up of his family establishment, in a particular manner. All this, by the widow's renunciation, has become impracticable.

2. The eighth and eleventh clauses have obviously reference to the making provision for the support of the family establishment, an object that has utterly failed by the widow's renunciation. So that the power to lease and to sell, conferred by those clauses, no longer exists.

Besides, the powers are wholly incompatible with the widow's dower that has been claimed since the testator's death.

Where the purpose for which land is to be converted into money, fails, the conversion will not take place. See *Ackoyd v. Smithson*, 1 Bro. 503, particularly the argument of Scott, afterwards Lord Eldon.

*F. M. Haight*, for same.

The devisees are entitled to the immediate enjoyment of the real estate, unless that enjoyment has been postponed by clear and unequivocal language.

In the eighth clause of the will relied upon by the defendants, to establish such postponement, the words "if not sooner" cannot be rejected, and they must be held to qualify the otherwise general language of the section. It is a general rule in the construction of wills, that words are, in all cases, to receive a construction which will give *every expression* some effect, rather than one that will render any of the expressions inoperative. Jarman on Wills, vol. 2, p. 743.

The respondents say that the words "*if not sooner*" relate to a supposed contingency, which they imagine was in the mind of the testator; and that he referred to the death of Eugenia before marriage or majority, when, as they suggest, there would be no obstacle. The first answer to this is, "that courts are not permitted to give an effect to the will of a testator, contrary to the plain and obvious import of the terms used

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by him, upon a mere conjecture as to his intention." *Manigault v. Deas*, 1 Bail. Eq. 298.

The language is, "*if not sooner.*" It is not, if not sooner made by reason of the death of Eugenia, but if not sooner made in any way.

The second answer is, that the clause contemplates a partition in the life-time of Eugenia. There is no reference to her death. The partition is to be made when she is married or of age, if not sooner done.

The third answer is, that the law "abhors" what savors of perpetuity, and will make no presumptions, indulge in no conjectures to make out such a case. If the reading be doubtful, this should be decisive. It is not presumed that any person intends to tie up his property and prevent its enjoyment by his children until they are past the age of enjoyment. It is against the known policy of the law, and against the plainest dictates of natural justice and parental love. The power to tie up, for a certain period, is conceded, but it is equally clear that to do it, the language must be plain, express, and unequivocal. 16 Bud. 171. 6 Barb. Sup. Ct. Rep. 503.

The second point made by the respondents is, that upon the whole will, such appears to be the general intent. This general intention must be considered under two aspects:

I. That upon the whole will, it is implied that the testator intended to postpone the enjoyment of his estate by his devisees.

II. That other parts of the will give an interpretation to the eighth clause, which sustains the respondent's construction.

As to the first, there is no such principle tolerated as tying up by implication.

As to the second, there is no view of the will which renders an immediate partition inconsistent with any of its provisions. The power to lease, until a division is effected, is not inconsistent with a right to immediate partition. *Arnold v. Gilbert*, 5 Barbour Sup. Ct. Rep. 190. The same may be said of the power to sell. There is no object expressed, or sought

to be attained by the testator, in this eighth section, which is not better effected by an immediate partition. The circumstances of the testator's family, and the condition of his real estate, render the supposition that it was his intention to postpone the enjoyment of his estate for the period claimed, improbable, because unreasonable and unjust. 2 *Jarman on Wills*, vol. 2, p. 525, top page, rule 10.

*Spalding & Shepley*, for defendants in error, make the following points :

I. The general intention of the testator, as gathered from the whole will, was to postpone a division of his estate, until the time mentioned in the eighth clause.

It is the intent so gathered that is to govern in the construction of the will.

II. The power of leasing, given to the executors by the eighth clause of the will, is inconsistent with the idea of an intent to allow immediate partition.

III. The expression, "*if not sooner*," in the eighth clause, is not inconsistent with the intent to postpone a partition until Eugenia became of age. It may have referred to the contingency of the death of Eugenia, before marrying or coming of age. Those words must, if possible, be construed in harmony with the general intent, as gathered from the whole will. *Homer v. Shelton*, 2 Met. 202. *Morton v. Barrett*, 22 Maine Rep. 265-6. Even if those words were inconsistent with the idea of postponing a partition, yet as they are repugnant to the clear intent of the rest of the will, they may be rejected. *Bartlett v. King*, 12 Mass. 537. *Jarman on Wills*, vol. 1, p. 419, and cases there cited. (Perkins' ed.) *Needham v. Ide*, 5 Pick. 510. 5 Watts' Rep. 13.

The testator might have used the words without attaching to them any definite meaning, through some vague idea that something might happen to produce a partition sooner than he intended.

If the intention of the testator was to postpone a partition until Eugenia became of age or married, such intention must



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govern, as long as the will stands, no matter how much the law "abhors" it. The renunciation of the widow will not change the intention, nor will it be altered by any other circumstances not foreseen by the testator. *Act concerning Partition*, R. S. 1845, section 52.

V. The will, by necessary implication, vested the legal title to the real estate in the executors. 10 Paige, Chy. Rep. 242.

*Edward Bates*, on same side, from a minute analysis of the provisions of the will, argued that its whole scope and tenor were inconsistent with the idea of an intention in the mind of the testator to allow an immediate partition of his real estate; and that the words, "*if not sooner*," in the eighth clause, being merely parenthetical, expressed no intent, and were not repugnant to the substantial provisions of the will; but even if they were, they might sooner be rejected than all the disposing provisions of the will, which unquestionably express the "true intent and meaning of the testator."

GAMBLE, Judge, delivered the opinion of the court.

The question is presented, under the clauses of the will set out in the statement, whether a partition can now be made of the real estate. It is stated in the petition and admitted, that the widow has regularly renounced the provision made for her by the will, and that Eugenia, the youngest child of the testator, is about five years old.

As cases upon the construction of wills have but little authority in controversies which arise upon other wills, it is neither necessary nor useful to enter upon an elaborate discussion of the meaning and force of the language employed by the testator, in the present instrument.

It is obvious, from the first clauses of the instrument, that the chief design of the testator, in making a will, was, to secure to his widow and minor children, the support which, in their circumstances, he thought necessary, and that next after this object, he intended to provide for the division of his property at suitable periods. When we enter upon an examination of the provisions of the will, after reading this declara-



tion of his purpose in making it, we naturally expect to find in it, not only the provision for the support of the widow and minor children, during her widowhood and their minority, but also to find the "suitable periods" mentioned, when he wished the balance of his property to be divided among his children. We certainly would not expect that upon this point of a division of his estate, he had left the whole question open, so as to leave his children to proceed as if he had died intestate.

It is apparent that the testator intended, in the first article, to make the provision for his wife and minor children a charge upon the "revenue" and "income" of his estate, and this charge is intended to continue, certainly as long as there are minor children. The third article or section provides for leasing a portion of the real estate, if his wife did not think proper to occupy it. The fifth, still keeping the provision for his wife and minor children in view, as the prominent object in making a will, subjects the proceeds of his personal property, which he directed to be sold, to the payment of the sum required for the support of his wife and minor children, if the interest upon money "which he had out" and the general revenue of his estate should not be adequate to that object. The testator here evidently regards this interest upon money and the general revenue of his estate, as primarily and certainly charged with this burden.

In the sixth clause, the testator comes to the second object he had in view, in making a will, to-wit, the division, "at suitable periods," of the balance of his estate. He here directs that whatever amount may remain of the proceeds of his personal estate, interest or money, cash on hand, or general revenue of his estate, his executors should proceed to divide equally among all his children—the shares of the minor children to be put out at interest, under the direction of the Probate Court—and the executors are directed to make similar dividends and distributions, annually, until the accounts of the estate are closed. This clause contemplates a division of some of the effects, which will be completed at once, such as "the

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remainder of the proceeds of his personal estate," and "cash on hand;" but it also provides for annual dividends and distributions, and this can only apply to the other subject mentioned in the article, "the general revenue of his estate." This distribution is to be of the "remainder" of those different funds, and that remainder evidently is, what remains after the provision for his wife and minor children, during her widowhood and their minority, shall be deducted. As this provision, under the first clause, is to be "annually set apart, out of the revenue of the estate," and as the distribution of the remainder of the general revenue is to be made annually, the inference is natural and inevitable, that the testator designed the whole estate to be a productive fund, during the time this provision was to continue, unless he has expressed a different intent in some other clause.

In the eighth article, the testator has combined two objects, first, the manner in which the most valuable portion of his estate shall be made productive, and, second, the time at which his estate at large should be divided. He directs that his executors shall continue the system of leasing, which he had commenced, until his youngest child shall be of age or get married. What that system of leasing is, does not appear upon the record, but whatever it is, it is to be continued until his youngest child is of age or gets married. By necessary implication, the executors are to have the control of this property during the period they are to exercise the power of leasing it, and as, by the common meaning of the terms here employed, there is to be an annual income from the property leased, this direction is designed to enhance the "general revenue of the estate," which is first to provide the "annual" sum for the support of the wife and minor children, and after that is accomplished, the remainder is to be divided equally among all the children, under the sixth article.

The second object to be accomplished, under this eighth article, is the general division of the estate, and the "suitable period" for this, is, the majority or marriage of the young-

est child, "*if not sooner.*" The whole argument, in favor of an immediate partition, rests upon these words, "*if not sooner,*" and it is insisted that they must have effect given to them, in ascertaining the intent of the testator. It is true, that in construing a will, effect must, if possible, be given to all the words of the testator, and none must be rejected, unless there is an irreconcilable repugnance. It is to be observed, that the testator's design, as declared in the preamble to his will, is, in relation to the matter of dividing his estate, to "make an equal division," at "suitable periods," of the balance of his estate, amongst all his children. This design is only to be carried out by affirmative declarations of the periods at which the division is to be made. If the will were silent as to the times, the testator might be supposed to have forgotten one of the main objects he had in view, in making the will; but if there be in the instrument any language, indicating the periods, such language must receive the construction which will give effect to his general intent. If the words "*if not sooner*" were not in this clause, it is not supposed that there could be any doubt that the testator's intent was, that the general division should take place, when the youngest child attained majority or married. Does the insertion of these words express any different active intent? It is not sufficient that the mind of the testator contemplated a probability that a division might be sooner made; the question is, whether he has expressed an intent that it should be sooner made. It is plain, that the clauses, which make provision for the wife and minor children, and which are to be satisfied out of the annual revenue of the estate, suppose it will be held together as a productive fund, at least during the minority of the children, and this eighth clause fixes the period for the division, at the time when the youngest of those minors shall have attained to majority or married.

Taking the whole of these clauses together, it is not supposed to be in any degree doubtful, that the general intent of the testator was to postpone a division of his estate, during the

period that the revenue was charged with the support of his minor children. The words, "*if not sooner*," express no contrary intent. If they do, then, as they indicate no time at which partition is to be made, they leave the whole estate subject to partition by law at once; they cut off the powers given to the executors, to make the estate productive, by leasing it; they extinguish the eleventh section, which directs the executors to sell valuable portions of the real estate, and annul the sixteenth section, which confers a discretionary power on the executors, to sell the portions which they were previously directed to lease.

Such a construction is not to be given to these words, in the present case. As has been said before, they do not express any wish or intent of the testator. They are not, therefore, repugnant to any clause which affirmatively expresses his intent. There is no necessity for rejecting them, in order to give full effect to every intent of the testator. They occupy no other position and have no other effect, than merely to express the thought in the testator's mind, that a partition might take place sooner, under some circumstances, than the time at which he declared it should be made. If the youngest child should die a minor and unmarried, all the other children being adults, they and the widow might make a partition.

This would not be a partition under the will, and yet it would not be inconsistent with the will; and still it might take place at an earlier day than the youngest child would have attained to majority.

It is said, resort is not to be had to conjecture, in order to ascertain the intent of the testator, in using the words, "*if not sooner*." If the words, in themselves, or in the connexion in which they stand, expressed any intent of the testator, any design, or direction, as to the time at which partition is to be made, there could be no conjecture indulged, by which they should be made to refer to any other time than that in the mind of the testator; but when they have no such force, when they form but a parenthesis in the sentence in which they stand, we

are compelled to ascertain their meaning, by supposing the cases to which they refer. Accordingly, the counsel for the plaintiff supposes the clause ought to be read, as if it were in this form: "that partition shall be made when the youngest child is married or arrives at the age of twenty-one, if it has not been sooner effected;" and then, it is conjectured, that the words, "if it has not sooner been effected," mean, that the testator intended, that from the time of his death until the time when the youngest child should attain majority, the whole estate was left open to have partition made, as in case of intestacy, and that the scope and meaning of the clause is, a command, that if partition has been neglected so long, it shall certainly be made at that time. It is not thought that this is a correct construction of the language here employed. The whole will, in all its clauses, and in the intent of each clause, is at variance with the position that partition could be made immediately upon the death of the testator. The renunciation of the widow of all interest under the will, does not alter the intention or change the force of the language used by the testator. The provision made for the support of the minor children, is not lost by that renunciation. This is not a bequest to the widow of an annuity for the support of herself and the minors. The first article of the will no more vests an interest in the widow, than in the children. A sum is annually to be set apart out of the income of the estate, for the purpose of this support; but this differs entirely from a direct bequest of a specific sum to a widow, declaring the purpose to be, for her support and for the education and support of children, as was the case of *Hawley v. James*, 5 Paige R. 457. There, the legacy became lapsed, by the refusal of the legatee to take under the will; but here, we have a will, directing a sum to be appropriated annually, for the benefit of the widow and minor children, and the legacy directly bequeathed to neither, although the fund is to be disbursed by the widow.

Upon the whole case, the judgment of the Circuit Court must be affirmed.

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CARSON, *et al.*, Appellants, *vs.* WALKER, *et al.*, Respondents.

1. The Legislature has the power to change the terms of Courts, and to enact that all suits and process which had been made returnable to the term as fixed by the old law, shall be returnable to the term as fixed by the new law.
2. Executions against the estates of deceased persons were legal in this State, until the passage of the Act, approved Dec. 30, 1826, which took effect from May 1, 1827.
3. Under the Act of January 25, 1817, Sec. 5, taken in connection with the Act of January 12, 1822, Sec. 28, where an execution against the estate of a deceased person was issued in less than 18 months after the date of the letters testamentary, but the sale of the lands under it did not take place until more than 18 months had elapsed, the sale is valid.
4. An execution, issued within a period forbidden by law, on a judgment lawfully rendered in a court of general jurisdiction, is not void but only voidable.
5. Under the Statutes of this State, up to 1826, land which the testator had devised in trust for an infant child, might be levied on and sold, under an execution against the estate of the testator.

*Appeal from St. Louis Court of Common Pleas.*

On the 23d of June, 1850, the appellants filed a petition in the Court of Common Pleas of St. Louis county, stating, that William Stokes died seized and possessed *in fee* of a lot of ground in the city of St. Louis, fronting forty feet on Main street, by one hundred and forty feet deep, and particularly describing its metes and bounds.

That said Stokes, by his last will duly probated in September, 1823, gave John O'Fallon, in trust for Anne Carson, all his real and personal estate, to be held for her use till her marriage or attaining twenty-one years of age.

That at the decease of said Stokes, said Anne, his daughter, was only thirteen years of age, and that she married William Smith before she was twenty-one years old. That Smith died in 1842, and she married the appellant, Carson, in 1843.

On the 25th of January, 1834, O'Fallon, the trustee, conveyed to the said Anne, she being then the wife of Smith, all the real estate vested in him by the will aforesaid. In December, 1843, the said Anne re-conveyed to O'Fallon and Joab Bernard, in trust to her separate use, the property last mentioned.



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In October, 1849, O'Fallon released to the said Anne, then Mrs. Carson, all his title and interest in the same.

That in 1833, the defendant, Isaac Walker, under some pretended title, entered into the possession of the premises, and has held them since, under some pretended judicial proceedings; but that the same are fraudulent and void. That if any sale was made, it was under an execution that issued, was levied and sale advertised, prior to the expiration of eighteen months from the death of said Stokes; that the said property was incapable of division without injury thereto, and the sheriff pretends to have sold it for more than three times the amount of the debt.

That the other appellees were in possession, as tenants of Walker. The petition then prays for possession and for an account of the rents and a judgment for them.

Walker, Throgmorton and Byron, being the only defendants served with process, filed their answer October 10, 1850, stating that they have no information sufficient to form a belief whether Stokes was well seized in fee at his death, or whether said Anne was then about thirteen years old, or what was her age, or whether she married Smith before she was of age. On the 9th of September, 1823, letters testamentary were granted to O'Fallon as executor of said Stokes.

On October 8, 1824, Benoist recovered judgment against said Executor, in the St. Louis Circuit Court, for \$664 07.

On the 17th of December, 1824, execution issued thereon to the sheriff of St. Louis county, and the same was levied on the property in dispute, and the said property was advertised for sale, and was sold on the 18th day of April, 1825, at the court house door in the city of St. Louis, to Thomas Houghan, at the highest bid, \$2050, and sheriff made the said Houghan a deed, dated April 19, 1825.

On the 13th of December, 1829, said Houghan and wife by their deed of that date, conveyed to Larkin Deaver.

On the 23d of February, 1830, said Deaver, by deed of that date, conveyed to Joshua Walker.



On the 5th of October, 1833, Joshua Walker and wife conveyed to Isaac Walker.

The defendants state that said judgment was a good and valid judgment, *and that the said execution, advertisement, proceedings and sale, were in strict conformity with law, and under and by virtue* of the same, and the subsequent conveyances, all the title of said Stokes was vested in the said Isaac Walker.

That immediately after the execution of the sheriff's deed to Houghan, he entered into possession of the premises adverse to all persons, and the possession has continued uninterruptedly down throughout the several purchasers to this time.

The defendants deny that the judgment, sale and proceedings were void or fraudulent. They had no notice thereof, if fraudulent. They deny that the premises were susceptible of division for the purpose of sale, without injury. That there were on the lot, at the time of sale, a brick dwelling house, and a stone warehouse; and they were so placed on the said lot as to extend nearly across it, and said lot could not have been divided without injury to the same.

The evidence on the trial was as follows. The plaintiffs in the lower court introduced,

1. The will of Wm. Stokes, of which the only clause important here, is in these words: "I give, devise and bequeath unto John O'Fallon, all my personal estate, upon trust, to dispose of the same as in his discretion he shall think fit. Also, I give, devise and bequeath to him all my real estate, upon trust, without making any forced sale or sacrifice thereof, to convert the same into money, and place into securities of the United States, and to apply the interest and such part of the principal, as may be necessary to the support, maintenance and education of my daughter Anne, who was thirteen years old on the 12th of May last, until she arrives at the age of twenty-one years, and then to pay and deliver to her the whole amount thereof, and all accumulations thereon. In case my daughter shall marry before twenty-one, with the consent of my executor, he

may deliver to her such portion of the principal as he may think fit, to and for her own use and benefit. In case she dies, leaving a child or children, then the property to belong to such child or children ; but in case of her death before twenty-one, without leaving any child or children, then I give the same to my executor for his absolute use and benefit."

"I appoint John O'Fallon executor of my last will, and guardian of my daughter."

2. The deed of John O'Fallon to Anne Smith, conveying to her all the real estate devised him in trust, by the will, dated January 25, 1835.

3. The deed of Anne Smith to John O'Fallon and Joab Bernard, conveying to them all her real estate, and all interest, legal or equitable, in any real estate, in trust, for the sole and separate use of the grantor.

This deed was made with Carson's consent, and in contemplation of marriage between him and the said Anne, dated December 28, 1843.

4. The deed of John O'Fallon to Anne Carson, releasing to her all his title to any property conveyed by the last named deed, dated October 15, 1849.

5. John O'Fallon was then introduced as a witness, and stated that he knew Wm. Stokes ; that he resided in St. Louis, and died September 3, 1823 ; that the plaintiff, Anne, was his daughter and only child, and was the same Anne named in the will of said Stokes ; that she married William Smith, May 20, 1829 ; that he always considered her of the age mentioned in the will. She was not twenty-one years old when she married Smith, who died late in 1842. That about two years after she married Carson.

That Stokes died seized and possessed of the property in dispute ; and the same was then improved. That from the time of instituting this suit, till now, and for two years preceding the institution this suit, the yearly value of the premises was \$2500 or \$3000.

6. A marriage certificate, showing that the marriage between

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Anne Stokes and Wm. Smith, took place May 5, 1829, certified by the minister, the Rev. Mr. Monroe, May 20, 1829.

John O'Fallon, cross-examined by the defendants, stated, that he was present at the sale of the property by the sheriff and bid for it; that \$2000 was as much as could have been gotten for it; that the old buildings on it, at the time of the sheriff's sale, have been removed and others put in their place. Thinks they were put there by Deaver or Walker, some ten or twelve years ago; and if the property was in the condition it was at the sheriff's sale, it would not rent for more than \$1000 per annum.

All this matter drawn out on the cross-examination, was objected to by the plaintiff as irrelevant and illegal, but the court overruled the objection and would not exclude it from the jury, and the plaintiffs excepted to the opinion of the court.

That the property would not have brought so much if he, O'Fallon, had not attended and bid on it; that he made one Davidson, who was bidding, run the property up to \$2000.

7. The plaintiffs then introduced Frederick Dent, as a witness, who stated that he knew Wm. Stokes; that Stokes died in possession of the property in dispute; that Anne, his daughter, was not twenty-one years old when she married Smith, and that in 1820, the warehouse on the lot rented for \$600. *Cross-examined*—Property fell in value in 1821-2, and continued depressed five or six years. At the sheriff's sale, there was a dwelling on the lot at the corner of Main and Vine, and this dwelling and a shed that was attached to it, extended nearly the entire extent of the property on Main. It stood back from Main some ten or fifteen feet. It extended on Vine sixty or sixty-five feet to an alley ten or fifteen feet wide. Then there was a house on Vine, about forty feet in front, which had been rented to the Fur Company.

1. The defendants then introduced the record of the suit of *Benoist v. Stokes*, showing declaration filed in the Circuit Court clerk's office of St. Louis county, May 16, 1823;

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summons issued May 16, 1823 ; summons executed May 16, 1823 ; pleas filed June 9, 1823 ; *scire facias* against O'Fallon, executor of Wm. Stokes, deceased, issued December, 1823 ; returned executed December 16, 1823, and a judgment rendered against said Stokes' executor, October 8, 1824, for \$664 07 ; execution issued on the said judgment December 17, 1824, and returnable by the tenor and effect on the 1st Monday in February, 1825. There is no levy endorsed upon the execution, but the advertisement recites a levy, and the advertisement is dated February 24, 1825, and was returned with the execution. The plaintiffs objected to said record as any evidence in the case, but the Court overruled their objection *and admitted the said record, and plaintiffs excepted to this opinion of the Court.*

2. The defendants then introduced a deed from the sheriff of St. Louis county, to Thomas Houghan, reciting the said judgment and execution, and that after issuing the same, it was made returnable by an act of the Legislature to the March term, 1825, and reciting that the same was levied on the property in dispute, February 24, 1825, and sold April 18, 1825. This execution was originally returnable 1st Monday in February.

The defendants then offered the deeds of Houghan to Deaver ; Deaver and wife to Walker, and Walker to Walker, to all which deeds, including the sheriff's, the plaintiffs objected, and the court overruling their objections, they *excepted to the opinions of the court.*

The defendants then introduced the letters testamentary to John O'Fallon on the estate of Stokes, dated 9th September, 1823.

This was all the evidence offered in the case.

The plaintiffs moved the court to instruct the jury,

1. That the sheriff's deed offered in evidence was inoperative and void, and forms no bar to the plaintiffs' action.

2. That if the execution against O'Fallon, executor of Stokes, issued before eighteen months had expired from the

death of Stokes, or the granting letters testamentary, and was levied and advertised before the expiration of such time, the sale is void, and no bar to the action of the plaintiffs.

3. That the legal title of Stokes in all his real estate, passed by his will to O'Fallon, and if the property in dispute was part of what was so devised to O'Fallon, it was not subject to levy and sale under said execution, and that the sale so made was without authority of law, and conferred no title on the purchaser nor those claiming under him, and they ought to find for the plaintiffs.

4. That said execution issued from the clerk's office of the Circuit Court, conferred no authority in law on the sheriff to make said sale, and said sale was a nullity, and they ought in that case to find for the plaintiffs.

5. That if the property was sold after the return day of the execution, that said sale so made was a nullity, and that in that case the jury ought to find for the plaintiffs, unless they believe some other authority was given the sheriff to make said sale other than that found in said execution.

But the court refused to give any of said instructions, and the plaintiffs *excepted to the opinion of the court.*

The defendants then moved the following instructions :

1. If the sheriff's deed was duly executed at its date by the sheriff of St. Louis county, and that at the sale of the lot therein described, O'Fallon, the executor of Stokes, and trustee in his will, was present and a bidder, and the sale was with his consent, and for the full value of the property at the time, then said sale and deed passed the title of the lot so sold and conveyed.

2. That there is no irregularity in the judgment, execution and proceedings in the suit of *Benoist v. Stokes'* executor, or in the sale and deed of sheriff, sufficient to avoid the sale.

To the giving of these instructions plaintiffs objected, but the court gave them, and the plaintiffs *excepted to the opinion of the court.*

The jury found a verdict for the defendants ; the plaintiffs

moved the court to set aside the verdict and grant a new trial,

1. Because the court admitted illegal evidence ; 2, excluded legal evidence ; 3, gave illegal instructions ; 4, refused legal instructions ; 5, the verdict was against law and evidence.

The court overruled the motion, and the plaintiffs excepted and appealed to this court.

*Glover & Campbell*, for Appellant, argued that the sheriff's sale to Houghan passed no title, because,

1. The execution under which it was made was void, having been issued against the testator's lands, within a period during which they were exempted from seizure or sale.

1 Terr. Laws, p. 510. 8 Metcalf, 502. 10 Mass. 365. 7 Mo. 585. 1 Mo. 364. 3 Smedes & Mar. 470-1-2. 16 Verm. 393. 21 Verm. 199. 4 Yeates, 212. 1 Blackf. 210. 3 Howard, 707. 4 Pick. 45. 7 Pick. 156. 6 T. R. 320. 2 Barr, (Pa.) 219. 1 Shep. Touch. top page 122. 5 Verm. 311. 2 Johns. 213. 20 Johns. 341. 1 Peters C. C. R. 64.

To say that an execution could issue, but could not be *executed* until after the lapse of eighteen months, is a contradiction of terms. A valid execution has no probation to pass through. It comes into being in full life, and derives its power from the seal of the court, not from the lapse of time. An execution which commands an officer to do *what he has no power to do*, and to do immediately, is void.

The object of the act of 1817, was to protect the estate of deceased persons from execution for the period named. To allow execution to issue within that period, would be contrary to the policy of the law.

The provisions of this law are not merely directory. The directory part of a law is that which points out the *manner* of doing something proper to be done, and the doing of which the laws enjoin. A departure from this part of a statute will not vitiate *the act which is required to be done*. 6 Wend. 486. But this does not apply where something which the law deems impossible is forbidden.



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The consent of O'Fallon cannot make the sale valid, because he had no power to give such consent.

2. This is not merely a question as to the regularity or irregularity of process, but one of *power*, as respects the legal condition of the real estate itself during this prohibition. 2 How. S. C. R. 318. 7 Mo. 105. Ib. 359, 503. 1 Mo. 95. 3 Yerg. 241. 16 Com. 144. 7 Dana, 506. 3 Humph. 213. 2 McCord, 352. 6 Mo. 106. 5 Humph. 56.

3. The levy was void, because it was made after the return day of the execution. The act of February 5, 1825, was merely intended to substitute one *return day* for another, not to allow sheriffs to *levy* after the 7th February, 1825.

*Aylett Buckner*, for same, contended that the sheriff's deed was void, because,

1. The execution issued before the time authorized by law.
2. The levy was made before the time authorized by law.
3. The levy was made after the return day of the execution.
4. No execution could lawfully issue from the clerk's office of the Circuit Court, against the estate of deceased persons, under the administration law of 1822.

5. The land having been devised to O'Fallon, a stranger, was not liable to sale by a writ of *fi. fa* upon judgment against the executor.

6. The execution issued contrary to the directions of the statute.

7. The law did not authorize the sheriff to make a deed of conveyance to the purchaser under a sale of decedent's lands by the act of 1817.

*Finley & Byron, v. Caldwell*, 1 Mo. 365. *Scott v. Whitehill & Finch*, 1 Mo. 495. 1 Burrows' R. 447. 4 Bibb (Ky.) Rep. 332. 8 Met. 3 How. S. C. R. 229. 2 Mason, 70, *United States v. Slade*. 10 Pet. 471. 2 Burr. 217. 1 Mo. 549. 1 Black. 210. 6 Monroe, (Ky.) Rep. 32. *Gault v. Ewing*, 3 How. 707. Anthon's Blackstone, 168. 6 Monroe, 421. 2 Powell on Devises, 462. 2 Dallas, 387-8. 3 Dana.



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*Spalding & Shepley*, for respondents, argued the following points :

I. The sheriff's deed and sale are not void because of the alteration of the time to which the execution was returnable, and because the sale was made after the return day at the term to which the execution was continued by the statute. 1 Edwards, 860-1, sec. 5. 1 Mo. 691 and 764.

II. The sheriff's deed and sale are not void because the execution issued within eighteen months after letters testamentary issued to O'Fallon, on the death of Stokes. 12 Mo. Rep. 261. Act of January 25, 1817. Act of January 12, 1822, sec. 28. 6 N. H., 63. *Blaine v. the Charles Carter*, 4 Cranch, 328. 4 Bibb, 332. 9 Mass. 95. 5 Johns. 89. 4 Wend. 474, 462. 1 Monroe, 94. 5 Monroe, 479. 12 Mo. 238. *Milburn v. State*, 11 Mo. 188. 11 Mo. 384. *Reed v. Heirs of Austin*, 9 Mo. 731. *Jackson v. Delany*, 13 Johns. 540. *Jackson v. Robins*, 16 Johns. 537. 13 Johns. 97. 3 N. H. 535.

III. The sale and sheriff's deed to Houghan are not void because more land was sold than was necessary to raise the amount of the judgment, or because it could have been subdivided to advantage, if such had been the fact. 7 Mo. 346. *Hicks v. Perry*. *Rector v. Hart*, 8 Mo. 459. 5 Mo. 322. 1 Gilman, 435. 18 Johns. 355. 9 Mo. 782. 8 Greenl. 207. 3 McCord, 142. 4 Wend. 462, 474. 2 Ala. 676. 2 Bibb, 401. 9 Watts and Serg. 182. 2 McLean, 59. 6 Humph. 281. 2 Richardson's Eq. Rep. 4. 10 Smedes and Mar. 4 Monroe, 465.

RYLAND, Judge, delivered the opinion of the court.

From the statement in this case, it appears that Wm. Stokes died on the 3d day of September, 1823. That he made his will, which was admitted to probate on the 9th of September, 1823. That Col. John O'Fallon was appointed executor by said Stokes, and that he undertook the burden of said trust.

That sometime previous to the death of Stokes, Louis A. Benoist commenced an action of assumpsit against him in the

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St. Louis Circuit Court ; the summons was issued on the 16th of May, 1823, and was executed on him by the sheriff of St. Louis county, on the same day. To this action, Stokes appeared by his attorney, and filed his plea, on the 9th of June, 1823. During the pendency of this action, Stokes died, and a *scire facias* was issued against his executor, O'Fallon, which was executed on him on the 8th day of January, 1824. The action was revived against John O'Fallon, the executor of said Stokes, who filed his plea, and the action was then continued. On the 8th of October, 1824, judgment was rendered against O'Fallon as executor, in favor of Benoist, for the sum of \$664 07. That execution issued on this judgment, on the 17th of December, 1824, returnable on the 1st Monday in February, 1825, which said 1st Monday was, as appears from the almanac of that year, the 7th day of the month. That before the 1st Monday in February, 1825, the Legislature changed the time of holding the Circuit Court for St. Louis county, from the 1st Monday in February, to the 4th Monday in March ; and by the act changing the terms of the court, declared "all suits and process made, or to be made returnable to the next terms of the several courts, as heretofore established by law, shall be returnable to the first terms of the respective courts to be holden by virtue of this act. And all sales of property, which would have been made at the first terms, as heretofore established, shall be made during the first terms to be holden by virtue of this act. In all cases where the sale of property may have been advertised to be made, on any day of the term as heretofore established, to satisfy any execution returnable to such term, the said sale shall be made on the same day of the term to be held by virtue of this act." Digest of 1825, pp. 280-281. By virtue of this statute, the execution was made returnable to the 4th Monday in March, 1825. Under this execution, the sheriff advertised the lot of ground in the city of St. Louis, now in controversy, on the 24th day of February, 1825, and sold the same under the execution, on the 18th day of April, 1825, to Thomas Houghan, for two

\$2050. The sheriff made a deed to Houghan in proper form, and the defendants claim under Houghan.

At the death of Stokes, he left a daughter about thirteen years of age, named Anne, who was married before she was twenty-one years old, to one Smith, who died; and said Anne afterwards married John B. Carson, one of the present appellants and plaintiffs.

That Stokes, by his said will, gave to said John O'Fallon, in trust for his said daughter Anne, all his real and personal estate, to be held for her use, until she married or arrived at twenty-one years of age.

In 1834, O'Fallon conveyed to said Anne, then the wife of Smith, all the real estate vested in him by the will of Stokes. In 1843, the said Anne, being then a widow, conveyed all the property back to O'Fallon and Joab Barnard, in trust for her separate use. In 1849, O'Fallon released to said Anne, then Mrs. Carson, wife of John B. Carson, all his title and interest to the property first conveyed by him to said Anne, and which she had conveyed before to him.

The plaintiffs claim the property in question under the will of Stokes, because, as they contend, the sale of it by the sheriff to Houghan was void, and the deed of the sheriff to him conveyed no title, or right, or estate to the lot in question.

The main question then, although surrounded with many others of minor importance, is, was this sale of the land to Houghan void—a mere nullity; or was it only voidable? If void, then the defendants claiming under the purchaser at that sale, can derive no title to the property sold.

We must look at the law as it stood in 1824 and 1825, and prior to these dates.

1. First, I will state, that in the opinion of this court, it was perfectly competent for the Legislature to change the times heretofore established by law, for the holding of the courts in this state, and that they could postpone and continue all suits, all process, all sales, all advertisements of sales, to such subsequent terms of the courts, as should be fixed by law. There

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is nothing, then, in the point denying the power to the Legislature. "All process," when speaking of the courts and suits, is a term ample and broad enough to embrace writs of execution and *fieri facias*.

By the territorial act concerning wills, descents and distributions, approved January 25, 1817, sec. 5, it is declared, that "all lands, tenements, hereditaments shall be liable to be seized and sold upon judgment and execution obtained against the defendant or defendants in full life, or against his or her heirs, executors or administrators, after the decease of the testator or intestate; provided, no such lands, tenements and hereditaments shall be seized and sold until after the expiration of eighteen months from the death of such ancestor, or the date of the letters testamentary or letters of administration; and execution may issue against such lands, tenements or hereditaments after the death of such ancestor, testator or intestate, and after the time aforesaid, in the same manner as if such person were living."

The 28th sec. of the act concerning administration, approved January 12, 1822, permits an execution to issue on a judgment against an executor or administrator, after one year from the date of the letters of administration. The 57th sec. of the same act repeals all acts and parts of acts coming within the purview of this act.

The 35th sec. of the act concerning "Practice at Law," approved January 11, 1822, declares, "If either party to an action pending in any of the courts of this State, shall die before final judgment, the executors or administrators of such party, if the action doth by law survive, shall have power to prosecute or defend such suit or action to final judgment, and if any executor or administrator, being duly served with a *scire facias*, twenty days before the return thereof, shall neglect or refuse to become a party to the suits, the court may render a judgment against the estate of the deceased, in the same manner as if the executor or administrator were a party," &c. This act was in force in March, 1822.

2. By the act concerning administrators and executors, approved December 30, 1826, and to be in force from and after the 1st of May, 1827, it was declared that "no execution shall issue upon any judgment or decree rendered against the testator or intestate in his life time, or against his executors and administrators after his death, which judgment or decree constitutes a demand against the estate of any testator or intestate within the provisions and meaning of the act, "entitled an act concerning executors and administrators," approved 21st of February, 1825, but all such demands shall be classed and proceeded on in the Probate Court, as required by said act."

Until the passage of this last act, the sales of land, on execution against executors or administrators, were legal and authorized. This is the act that first abolished executions against the estates of deceased persons.

By the force of these various provisions of the statute of the territory and state of Missouri, it is obvious that the courts of the territory, and afterwards of the state in which actions were pending against executors or administrators, which actions were ripened into judgment, had the power and authority to enforce these judgments by execution against the estate of the testator or intestate, by selling the real estate belonging to said estate.

The common law doctrine of selling the usufruct but not the real estate itself, has no affinity or relation to this subject; nor can it afford us any light on this subject.

The statutes cover and control this whole subject.

3. Let us now look into the objections made by the plaintiffs' counsel against this sale. They contend that, as the execution issued within eighteen months from the death of the testator, or within eighteen months from the date of the letters testamentary, that the execution is void; and this is the strong objection on their part.

Let us look at the words of the statute of 1817. This provides, that all lands may be sold on execution against executors and administrators, "provided no such lands, tenements or

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hereditaments shall be seized and sold until after the expiration of eighteen months from the death of such ancestor or the date of the letters testamentary or letters of administration; and execution may issue against such lands, tenements or hereditaments, after the death of such ancestor, testator or intestate, and after the time aforesaid, in the same manner as if such person were living."

In this case, the death was on the 3d of September, 1823; the judgment on the 8th of October, 1824; the execution, on the 17th of December, 1824; the advertisement or notice of the sale, on the 25th of February, 1825; the sale on the 18th of April, 1825. Can any one say that this "seizure and sale" were within eighteen months from the day of the ancestor's death? On the 4th of March, 1825, eighteen months had elapsed from the day of the death of Stokes. The lot was sold on the 18th day of April, 1825. There were more than nineteen months between the date of the letters of administration and the sale. Then this seizure and sale were not within eighteen months from the death, and consequently were not obnoxious to the provisions in the statute of 1817. But the plaintiffs' counsel resort to construction of the phrase, by turning the copulative into the disjunctive—the "and" into the "or." No such lands shall be seized or sold until, &c. Why resort to this? For what practical benefits? To be enabled to overturn a fair, *bona fide* sale, at full price, made in the presence of the executor, who bid himself until the property was at its worth: the proceeds of which sale were appropriated to the discharge of so much of the debts of the testator.

Change the formation of the sentence in order to overthrow a sale under a formal execution, issued on a regular judgment, obtained after full notice to the parties, in a court of competent authority and general jurisdiction!

Courts of justice generally endeavor to support the sales made by ministerial officers in execution of their judgments. It is for the good and welfare of the community that such sales should be supported. Under this rule, men generally are will-



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ing to pay reasonable prices for property at such sales ; but overturn this rule, and wild speculations and ruinous sacrifices must ensue.

But let us look a little farther into this subject of issuing execution upon a judgment against an estate.

The statute of the Legislature of the state, passed in Jan., 1822, concerning "Administration," sec. 28, is as follows : "No executor or administrator shall be compelled to pay any debts of the deceased until one year after taking letters testamentary or of administration ; and if any person shall bring an action against an executor or administrator, within one year, as aforesaid, such person, although he may obtain judgment for the amount of his debt or demand, shall not recover any costs of suit ; and no person shall take out an execution on such judgment, within one year as aforesaid, nor shall any execution issue on any judgment obtained against the testator or intestate in his life time, in less than one year after granting administration as aforesaid ; and in all cases, where judgments are rendered against executors or administrators, to be levied on the goods and chattels, lands and tenements of the deceased, the judgment shall not be entered against the executor or administrator for costs of his own proper goods."

The obvious meaning of this section is, that executions may issue on judgments against executors and administrators, against the goods and chattels, lands and tenements of the deceased, after the expiration of one year from the date of the letters.

The letters in this case were dated 9th of September, 1823 ; execution issued on 17th of December, 1824 ; the notice of sale on the 25th of February, 1825, and the sale on the 18th of April, 1825.

As to the seizure of land under execution, that is a mere phrase, applied generally to personal property.

The sheriff finds out the description of the tract by its number of section or quarter section, range and township, and its general locality, and advertises it for sale, without ever putting



his foot upon it. He describes it as truly and as correctly as he can : its number, if a lot ; its block, street or alley, &c.

The seizure is never felt or known, until the advertisement is put up, to give the legal notice. Under either of these statutes, that of 1817 or 1822, the sale of this lot in controversy was substantially in conformity to the provisions of the law. In viewing the facts, as they appear from the record, we see no sufficient cause for sustaining a motion, had one been made to set the sale aside in the court below, from which the execution issued, and under which the sale was had.

In our opinion the act of the Legislature postponing the term of the St. Louis Circuit Court, from the 1st Monday in February, to the 4th Monday of March, in 1825, was one fully within the power of the Legislature. For more than twenty-five years, such acts have been passed and been acquiesced in : no one ever doubted the authority of the Legislature, as far as my knowledge of this matter extends, and I have had more or less to do in the courts of the country, from a period shortly before a change of the government from a territory to the state—a period of more than twenty-two years. The terms of that act were comprehensive enough to embrace executions on judgments.

The case of *Scott v. Whitehill & Finch*, 1 Mo. Rep. 691, settles the question about the force and effect of an execution and sale under it, under circumstances much like those of the present case. On the 7th of October, 1824, Hill & Reese obtained judgment in the Circuit Court of St. Louis, against the administrators *de bonis non* of Thomas Brady, on which they sued out an execution on the 17th of December, 1824. Under this execution, the premises in question were sold on the 31st of March, 1825, and David Hill became the purchaser, under whom the defendant in that suit claimed. This execution is of the same date of that of *Benoist v. O'Fallon*, under which Walker claims title ; 7th of October, 1824, the judgment was dated (one day before Benoist's judgment ; ) on 17th of December, 1824, execution was issued ; sale made 31st of March,

1825. This was held by the court legal and authorized. The power of the Legislature to postpone the term ; the continuance of the execution, and the sale at the subsequent term ; the authority of the clerk to issue the execution—all could have arisen in that case, yet the power of the clerk alone was disputed. The legislative power was not mooted. The court decided that, after eighteen months from the granting letters of administration, &c., an execution might, on a judgment obtained against either the administrator or intestate, issue.

This decision settles the main question in the present case. The time of the issuing the execution only remains here undecided. The court said it might issue after eighteen months from the date of the letters of administration, &c., but did not say it could not lawfully issue before.

4. Now for the sake of argument, let us take the act of 1817, as the only one in force. What would be the effect of an execution issued within a period forbidden by law, on a judgment lawfully rendered in a court of general jurisdiction? Is it void or voidable?

It has been decided by this court, that a sale of the lands of deceased persons was authorized under executions against their personal representatives. The right to an execution against a decedent's real estate was never doubted. The power to issue an execution, previously to the statute of 30th of December, 1826, by a clerk of the Circuit Court, on a judgment against the estate of a deceased person, was not to be disputed. The time of doing the deed only is relied on as rendering it void. I am satisfied from reason and authority both, that the time is not so much of the substance of the power and act as to render the act void : see 4 Cranch 333. Executions were issued in this case within ten days from the rendition of the judgment, contrary to an act of Congress which provides, that "until the expiration of ten days, executions shall not issue." The Supreme Court of the United States held, that the Marshal could have justified, under these executions ; that they were

not void ; and if voidable, the proper means of destroying their efficacy had not been pursued.

In the case of *Wilson v. Waston*, 4 Bibb, 332, the court of appeals of Kentucky held, that the circumstances of there being more than ninety days between the *teste* of the writ and the return of the writ of execution, did not make the execution void ; although the statute required, that there should be at least twenty, and not more than ninety days, between the *teste* and the return of such writs. The court stated, that as the time required between the *teste* and return of the writ, is not of the essence of the writ, but rather directory to the clerk in issuing it, an error in that respect should not have a greater operation than the making of an execution at common law, bear *teste* out of term time, would have ; and consequently, at most, is but matter of error, by which the party might avoid the process, but of which the sheriff, in a proceeding against him, could not avail himself. That the execution was not absolutely void, we apprehend, there can be but little doubt.

The case cited by the plaintiffs' counsel from 8 Metcalf 500, *Penniman v. Cole*, is contrary to this doctrine. There the judgment was rendered on Saturday forenoon, at the end of the term ; execution issued after midnight on Monday morning following. The statute prohibits the issuing of *fieri facias*, until the lapse of *twenty-four* hours. The main question appeared to be, whether Monday was to be excluded or included in these twenty-four hours. The court excluded Sunday, and declared the writs thus issued, void. The whole object of the opinion appeared to be, to take care of the Sunday—to preserve the Sabbath day ; a very laudable one ; but, I think it so absorbed the question about the writ being void or voidable, only, that the latter received no attention. I cannot give my approbation to this opinion ; it does not call forth so clearly the assent to its correctness, as the opinion of the Supreme Court of the United States, above cited, in 4 Cranch, or the opinion of the court of appeals of Kentucky, above cited.

I have noticed the decisions of the cases cited by the coun-

sel for the plaintiffs; that in 1st Hill, among the others, I can derive no authority from these cases, satisfying me of the propriety of overturning the sale made in this case, if there had been no law in force except the act of 1817.

But when I consider the act of January 12th, 1822, authorizing the execution to issue after the expiration of twelve months from the date of the letters, there becomes no necessity to review these authorities on the one side or the other. And that such was the law at the date of the execution, as well as at the time of the sale, the statute itself leaves not the shadow of a doubt. Therefore, I shall abstain from further comment on this point of the case. I consider the execution properly continued alive in full force by the Legislature, from the 7th day of February, 1825, the return day originally, to the next term of the court, commencing on the 4th Monday in March, 1825; that notice and sale thereunder were efficacious to pass the real estate sold to the purchaser, Thomas Houghan.

I find no error in the testimony of the witness, O'Fallon; and I am satisfied as to the impracticability of dividing the lot in question, by the sheriff, without injuring the estate. Satisfied, from the evidence, that a fair price was paid for the lot, and that there was no fraud in the sale.

5. The remaining question now will demand my attention: that is, the power of the sheriff, under the statutes in force at that time, to sell the lands devised in trust by the testator, for the benefit of his infant daughter.

The statutes permitting the real estate of the testator or intestate to be sold, would become useless, if it was in the power of the testator to place his lands, by will, beyond the reach of his creditors. Such a power has never yet been sanctioned in our court, and is no where to be found in our statutes. The devisee is postponed to the creditor; a man must, by our law, be just, before he can be generous.

Various are the provisions from 1815, up to the 30th of December, 1826, respecting the sales of real estate belonging to the estates of deceased persons.

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The executor has the power over the estate, real and personal, in order to pay debts, and an execution is not barred by reason of a devise of the real estate.

Such has ever been the practice, up to the time that sales or executions were stopped by statute.

From the whole record in this case, then, we are of opinion, that the court below committed no error in refusing, or in giving the instructions, as they appear in this case.

We are satisfied that the court committed no error in overruling the motion for a new trial. Judge SCOTT concurring herein, the judgment below is affirmed, Judge GAMBLE not sitting in the cause, having been of counsel in the court below.

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KAYSER, Respondent, vs. TRUSTEES OF BREMEN, Appellants.

1. Under the act concerning "towns," (R. S. 1845), when the county court, under a state of facts, which gave it jurisdiction over the subject matter, has declared a town incorporated, the validity of its charter can only be contested by a proceeding in *quo warranto*.
- 2 That act is not unconstitutional. The duties imposed on the county court are judicial, and not legislative in their nature.

*Appeal from St. Louis Circuit Court.*

The opinion of the court sufficiently states the facts.

*J. R. Strother*, for appellants, contended that the general law of 1845, authorizing the county courts to declare towns incorporated, is constitutional, because the duties of the county court under it, are only judicial.

The law of 1845 was originally enacted in 1808. Under that law St. Louis, Carondelet, St. Charles, Ste. Genevieve, New Madrid, and many other towns in the state, were incorporated, and no one ever thought of questioning the validity of these charters.

The County Court having jurisdiction of the case, the validity of the charter cannot be taken advantage of in a collateral proceeding of this kind.

If the charter was obtained by fraud, a writ of *quo warranto* was the proper remedy.

*Leslie & Barret*, for same; contended that the legislature had the constitutional right to make the law which confers on the county courts the power to incorporate towns. No legislative power is delegated by that law. It only provides a way of incorporation, and defines the powers of a town thus incorporated; so that the powers are direct from the law-making branch of the government, and are not derived from the County Court.

If the corporation is without legal existence, it must be dissolved by *quo warranto*. *Bear Camp River Co. v. Woodman*, 2 Greenl. Rep. 404. *Charles River Bridge v. Warren Bridge*, 7 Pick. 371. Hall, 198. *Hughes v. Bank of Somerset*, 5 Litt. 47. 16 S. & R. 140.

*F. M. Haight*, for respondent.

1. The County Court had no jurisdiction to incorporate the defendants. 1 Peters, 3 Hill.

2. The jurisdiction depends upon the construction of the act. Rev. Code 1845, p. 1048. This act gave no authority to create corporations *ad libitem*. In this case there was no town. There was a suburb of St. Louis.

3. The law of 1845 is unconstitutional and void. 1 Yerg. 452. Corporations cannot be created except by legislative authority. The legislative power under our government is vested in the General Assembly.

This is a political trust, incapable of delegation. A private trust resting upon fiduciary confidence is incapable of substitution, much more is a political trust.

SCOTT, Judge, delivered the opinion of the court.

This is a petition for an injunction, filed by the respondent against the appellants, as trustees of the town of Bremen, to restrain the collection of taxes illegally imposed by said trustees, as it is alleged.

The town was incorporated by the County Court of St. Louis county, in pursuance to the provision of the act of the Gene-



ral Assembly, entitled "An act for the incorporation of towns," approved March 7th, 1845.

Amongst the many objections urged against the validity of the proceedings of the trustees, those two only will be noticed, which are relied on to sustain the action of the Circuit Court, viz:

1. That the County Court had no jurisdiction of the subject matter, there being no town to incorporate, within the meaning and intention of the General Assembly. 2. That the act of 1845, conferring on the County Courts of the respective counties, the power of incorporating towns, is unconstitutional, being the delegation of a political trust, which can alone be exercised under our institutions by the legislative power.

1. The first of the objections has no ground on which to rest. It is admitted that 164 inhabitants signed the petition, and that they lived in houses in the suburbs of St. Louis. Here, then, are houses and people, the two ingredients, if the houses are sufficiently near each other, which constitute a town, within the meaning of the act. It is obvious that those were all the requisites necessary to constitute a town, in the sense of the law. It is, moreover, admitted, that the people and houses make what is called in common parlance a suburb of St. Louis. Now, a suburb of St. Louis, if beyond its corporate limits, is as much entitled to be incorporated, and has as great need for the act, as though the same number of people and houses were forty miles distant from the city. The facts conceded, we conceive, gave jurisdiction to the County Court over the subject matter, and having declared the town incorporated the validity of its existence can only be contested by proceeding in a *quo warranto*. It cannot be shown, in defence to a suit of a corporation, that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by mis-user or non-user. Advantage can only be taken of such forfeiture by process on behalf of the state, instituted directly against the corporation, for the purpose of avoiding its charter, and individuals cannot avail themselves of it in collateral suits, until it be judicially declared.



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2. We do not conceive that the act of 1845 is a delegation of political power. The duties imposed on the County Court, in relation to this subject, are judicial in their nature. They have no discretion. They have no authority to vest any power in the corporation. Their office is, upon the performance of certain acts by the inhabitants, to declare them incorporated, if satisfied of the verity of the facts set forth, and then the law declares the powers of which the corporation shall be possessed. Such a mode of incorporation is becoming common, nor has its constitutionality been questioned. Had such a power been disputable, the ability of the counsel in the case of *St. Mary Church*, 7 S. & R. 524, forbids the idea that its departure from principle would have escaped their notice. That case was under a law which authorized a corporation to amend its charter, with the approbation of the attorney general and Supreme Court.

The other judges concurring, the decree will be reversed, the injunction dissolved and the bill dismissed.

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WATSON, Respondent, *vs.* THE COUNTY OF ST. LOUIS, Appellant.

Under the act of 1851, concerning the Law Commissioner's Court of St. Louis county, the county is not obliged to furnish a room for the transaction of the business of that court.

*Error to St. Louis Court of Common Pleas.*

On the 10th of October, 1851, the respondent filed a petition in the St. Louis Court of Common Pleas, stating that on the 20th of August, 1851, he paid the sum of one hundred and forty one 67-100 dollars for rent of rooms, from the 13th of March to the 13th of August, 1851, for the use of the officers and suitors in the Court of the Law Commissioner of St. Louis county, and that during the time above mentioned, he was the Law Commissioner of St. Louis county; that the County Court of St. Louis county failed and refused to provide any rooms or

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place for the transaction of the business in said Law Commissioner's Court; that rooms, as a place of business for said court, were necessary; that those provided by the said respondent, were suitable, and the amount paid reasonable; and he asked judgment for said amount and interest thereon.

To which petition the appellant demurred, for the following reasons, to wit:

1. It did not appear by said petition that the amount of money alleged to have been paid for rent, was paid at the instance or request of said appellant.

2. It did not appear by said petition that said appellant was liable to pay the rent mentioned in said petition.

3. There was no contract, either expressed or implied, stated in said petition, whereby said appellant is liable to pay to said respondent the amount sued for, or any other sum.

4. It did not appear by said petition that said appellant was legally bound to furnish a room or rooms for the said Law Commissioner's Court.

The court below overruled the demurrer and rendered judgment for the respondent. The appellant filed a motion for a re-hearing, and to set aside the said judgment, for the following reasons:

1. Because the demurrer ought to have been sustained.

2. Because the judgment ought to have been for the defendant.

3. Because there is no law which makes the appellant liable to an action, for the causes stated in said respondent's petition.

4. Because, if the appellant is liable, the remedy is by mandamus.

The court overruled the said motion, and the appellant appealed to this court.

*Lackland & Jamison*, for appellant, contend:

1. That the appellant is not bound to furnish a room to transact the business of the Law Commissioner's Court; that this court was one of limited jurisdiction, and the county is just as much bound to furnish rooms for justices of the peace.

The act establishing the St. Louis Probate Court expressly provides that the county shall pay all necessary expenses, for office rent, &c., and if the Legislature had intended that the county should furnish a room for the Law Commissioner's Court, they would have inserted a similar provision in the act.

2. The respondent has mistaken his remedy. If he had any, it was by mandamus. 19 Johns. 261. *Hull v. Supervisors of Oneida*, 1 Wend. 324. *People v. Corporation of Brooklyn*. *Boone Co. v. Todd*, 3 Mo. 103. *St. Louis Co. v. Ruland*, 5 Mo. 270.

*R. M. Field*, for respondent.

The legislature of Missouri, by act of 17th of February, 1851, established a court of record in St. Louis county, called "the Law Commissioner's Court." See acts of 1851, p. 241.

Section 1 constitutes the court a Court of Record, to all intents and purposes, with all the powers, duties and restrictions of such a court, according to the laws of this state.

Sections 3 and 4 confer on this court a large exclusive jurisdiction, carved out of the jurisdiction of the Circuit Court.

Section 7 confers upon the Law Commissioner a concurrent control with the Circuit Court over justices of the peace.

Section 12 gives to the commissioner, in general, the same fees and compensation that are allowed to clerks of the Circuit Court in like cases, to be taxed and collected in the same manner.

1. The expense of providing a good and sufficient court house, is to be borne by the county. Rev. Stat, tit. *County Buildings*.

This provision of the law extends to the offices of the clerks of courts of record. *Boone Co. v. Todd*, 3 Mo. Rep. 140.

This construction of the law by the Supreme Court seems to have been adopted by the legislature; for it is now provided by law, expressly, that clerk's offices shall be exempt from levy of execution against the county. Rev. Stat. 1845, chap. 38. See, also, Rev. Stat. tit. *Counties, their organization*, Chap. 39, sec. 24.

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2. It is made by law the duty of the sheriff to attend the several courts of record, and furnish stationery, fuel and other necessary things. Rev. Stat. tit. *Courts*, sec. 67.

The several courts are to audit the accounts of the sheriff and certify them for payment. *Ib.* sec. 68.

The payment of the amounts are to be made out of the county treasuries. *Ib.* sec. 71.

3. Clerks are required by law to provide suitable books, stationery and furniture for their offices, which, except in the case of clerks of the Supreme Court, are to be paid for by the proper county. Rev. Stat. tit. *Clerks*, sec. 16. See the case of *St. Louis Co. v. Ruland*, 5 Mo. Rep. 268.

4. The present remedy for action is proper. Rev. Stat. tit. *Counties, Conveyances*, sec. 6. *Boone Co. v. Todd*, *ubi supra*.

5. In confirmation of the conclusion derived from a comparison of the several statutes and judicial decisions in this state, the respondent refers to the following cases decided in the state of New York.

In *Bright v. Supervisors of Chenango*, (18 Johns. 242,) which is the leading case in New York, it was held by the court that the clerk had a just claim on the county for record books furnished by him, although the law had not expressly provided for the payment.

Again, in *Doubleday v. Supervisors of Broome*, (2 Con. 533,) it was held that the county was liable to the clerk for engrossing and entering the minutes of record. The statute law in this case was entirely silent on the subject of compensation.

So, too, in the case of *People v. Supervisors of Albany*, (12 Wend. 257,) it was decided that a judge who attended at the drawing of juries, was entitled to a compensation from the county, for his time and expenses.

*M. & F. P. Blair, Jr.*, for the same.

GAMBLE, Judge, delivered the opinion of the court.

This case seems to require a short history of the Law Com-

missioner's Court, which has gradually grown up from an officer appointed to take depositions, to the dignity of a court of record.

In the revised code of 1845, 690, we find the original act for the appointment of a law commissioner for St. Louis county, whose duty was the taking of depositions, and who was vested by the act with "the sole and exclusive power of taking depositions, to be read in evidence in the several courts of record in St. Louis county." The 4th section makes it "the duty of the said commissioner to have some suitable, convenient, and fixed place of business, which shall be within the city of St. Louis."

By the act of 4th February, 1847, the law commissioner was authorized to take and certify the acknowledgment of deeds—to act as a justice of the peace, in all criminal cases—to take examinations—to commit, admit to bail or discharge prisoners, in the same manner as a justice of the peace, and to solemnize marriages. By an act passed a week after the last, the commissioner was vested with concurrent jurisdiction with justices of the peace, in the actions and proceedings enumerated in the second and third sections of the first article of the act to establish justices' courts. The commissioner was, also, vested with concurrent jurisdiction with the Circuit Court, in all actions of detinue and replevin, wherein the matter in controversy does not exceed one hundred and fifty dollars.

It is to be observed, that while the office was thus rapidly increasing in consequence and emolument, the fourth section of the original act still made it the duty of the officer to provide some suitable, convenient and fixed place of business in the city of St. Louis.

We do not find that at the session of the General Assembly in 1848, there was an addition made to the powers of the commissioner.

The act of the 17th February, 1851, is entitled, "an act supplementary to the several acts concerning the Law Commissioner of St. Louis county." In its first section it provides,

that "the Law Commissioner's Court of St. Louis county, shall be deemed, to all intents and purposes, a court of record, and shall possess the powers, perform the duties and be subject to the restrictions of a court of record, as such, according to the law of the State." Several of the subsequent sections are employed in prescribing the jurisdiction of the court; greatly enlarging its original jurisdiction and conferring appellate jurisdiction from justices of the peace. The process is to be directed to, and executed by any constable of the township of St. Louis, or by the sheriff or marshal of the county. The twelfth section prescribes the fees of the commissioner, making them the same, in cases of original jurisdiction, with those received by justices of the peace; and, in appeal cases, the same fees are allowed as are allowed to the justices in the original trial; and for services not provided for in the fee bill of justices, he is to have the fees allowed by law to the clerks of the Circuit Court, for like services.

This act does not, in express terms, direct where the commissioner shall hold his court, whether in the city of St. Louis, or in some of the other townships; but the fourteenth section provides that "all acts relating to said Commissioner's Court, heretofore in force, which are not inconsistent with this act, shall be considered as still in force." The place at which the court shall be held within the county, instead of being dependent on the will of the commissioner, is, by the fourth section of the original act, fixed within the city of St. Louis. But if this section be in force for the purpose of commanding the court to be held in the city of St. Louis, it is equally in force for the purpose of designating the mode of paying the expenses of a court room, and it declares that it shall be the duty of the commissioner, "to have some suitable, convenient and fixed place of business," &c. Beyond all question, while exercising the powers conferred by the acts of 1845 and 1847, the commissioner was bound to bear the expense of his office or court room, as much as any justice of the peace in the state.

The act of 1851, which is supplementary to the previous acts, and which takes up the Commissioner's Court, as a tribunal already existing, and increases its jurisdiction, does not affect this question, unless the change is wrought by the declaration that the court shall be a court of record, and shall possess the powers, perform the duties and be subject to the restrictions of a court of record, according to the laws of the state. If the acts previously in force, conferring upon the commissioner jurisdiction to hear and determine causes, subjected him, by express enactment, to the burden of providing a place at which he was to administer the law to suitors, it is not perceived how the enlargement of his jurisdiction and the increase of his emolument, even when the dignity of the tribunal is increased, by making it a court of record, can exempt the incumbent of the office from the expenses and burdens to which, by express law, he has always heretofore been subject. In the different acts, to which reference has been made, nothing is found that expressly charges the county with the burden attempted to be imposed by this action, and nothing that can be held to repeal the fourth section of the original act, creating the office of law commissioner. There are many offices, in the performance of the duties of which the public have a high interest, and yet the offices are left, by law, subject to expenses and burdens, to be borne by the incumbent, and he takes the office subject to such burdens. The present is a case of that description. The demurrer to the petition was improperly overruled, and therefore the judgment is reversed and the cause remanded, with direction that a judgment be rendered by the Court of Common Pleas, in favor of the county, upon the demurrer.



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Moore & Porter v. Perpetual Insurance Company.

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MOORE & PORTER, Defendants in Error, vs. THE PERPETUAL  
INSURANCE Co., Plaintiff in Error.

1. The risks enumerated in the printed part of an open policy of insurance may be restricted or enlarged by the written endorsement of the particular shipment lost.
2. A memorandum, attached to the endorsement of a shipment of negroes, stated that they were only insured against the dangers incident to navigation, such as blowing up, drowning, &c.

*Held*.—This will cover a loss of a negro by drowning during the voyage, without any disaster happening to the boat, or any unusual occurrence causing him to fall overboard.

*Error to St. Louis Court of Common Pleas.*

*J. A. Kasson*, for plaintiff in error, insists that the underwriter "is only liable when the *damage* sustained is, in itself, of an *extraordinary nature*, and has been caused by the *direct and violent operation* of one of the perils insured against." 2 Arnold on Ins. 756.

Unless the degree of a peril and its effect be both extraordinary, the assured has no claim for indemnity. 1 Phill. on Ins. 245, (ed. 1823,) 625, (ed. 1840.) *Thompson v. —*, 3 Taunt. 227. *Coles v. Marine Insurance Co.*, 3 Wash. C. C. R. 159.

The ordinary hazards of a voyage, such as take place in the quiet, undisturbed and usual progress of it, are not within the perils taken by the underwriters. These are subject to the contract between the shipper and the owner. Extraordinary perils are taken by the underwriter; usual and ordinary by the carrier, except when they arise from the inherent character of the subject of insurance, in which case the peril rests with the owner. *Dale v. Hall*, 1 Wils. 281. *Hunter v. Potts*, 4 Campb. 203. *Rohl v. Pan*, 1 Esp. 444. 1 Phill. on Ins. 635-7, (ed. 1840.) *Boyd v. Dubois*, 3 Campb. 133. Smith's Mercantile Law, 214, 215, and cases cited.

The language of the policy does not enlarge the scope of the perils insured against. If it varies from the preceding terms of the contract in any respect, it restricts them. Why use the word "only," unless to restrict the scope of previous perils.

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These perils are *ejusdem generis* with those in the body of the policy. *Phillips v. Barber*, 5 Barn. & Ald. 161.

*Geyer & Dayton*, and *John C. Richardson*, for defendant in error.

The endorsements on the policy are such an interpretation of the terms of the policy, in respect to perils, as shows that the peril by which the loss in question happened, was included, even though those terms, without the endorsement, would not include it.

The peril was one against which a prudent owner of such property would seek protection. The carrier would not be responsible for a loss occurring from it. *Boyce v. Anderson*, 2 Peter's Rep. 150. The owner must, therefore, look to some other source for protection and indemnity.

The particular endorsement, under which this claim arises, states, that the *negroes are only insured against the dangers incident to navigation, such as blowing up, drowning, &c.* These terms are broader than those ordinarily expressed in policies, and, certainly, are such as would lead the plaintiffs to suppose they had indemnity against just such a loss as that which occurred, and this, we claim, is the fair interpretation.

Suppose the negro had been blown up by the bursting of a boiler, would there be any doubts of the liability of the underwriters? This court has already decided that the bursting of a boiler is a peril of the river, and its consequences to the boat and cargo must be borne by the insurers. *Citizens' Insurance Co. v. Glasgow et al.* 9 Mo. Rep. 411. Yet, the bursting of a boiler is rarely induced by external violence or injury to the boat.

But the language of the endorsement in question removes doubt on this subject, if any would exist, without such language. It clearly places a loss by drowning, upon the same footing with one by blowing up, and in neither case requires any previous disaster to the boat.

Other endorsements in the policy show what risks were intended to be covered. Negroes are "not to be manacled or



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handcuffed, so as to prevent them from swimming." Nor are they insured against "death by ordinary sickness, nor against leaving the services of the assured," but "are only insured against the dangers incident to navigation, drowning, blowing up," &c.

If the boat had sunk by a peril of the river, and the negro had thus been drowned, no question could have been seriously made of the liability of the underwriters, even independent of the peculiar language of the endorsement. To give any effect to this peculiarity, it must be construed as intended to embrace other risks than those covered by the printed terms of the policy, or as an interpretation of those terms, such as we contend for.

This case has been likened, by the opposing counsel, to one of goods being accidentally tumbled overboard and lost; but the cases are not alike. In one, the carrier is in fault and is responsible; in the other, he is neither. Slaves must be permitted to move about, and may fall overboard without the fault of the carrier, and in such case he is not liable.

GAMBLE, Judge, delivered the opinion of the court.

This is an action upon an open policy, to recover the value of a slave, who fell overboard and was drowned, during the voyage, without any disaster happening to the boat, or any unusual occurrence causing him to fall overboard. The policy covered such shipments as might be endorsed upon it.

There were several shipments of negroes and horses endorsed upon the policy, the first of which had this memorandum attached to it: "The horses and negroes entered above, are only insured against the dangers incident to navigation, drowning, blowing up, &c., but not against leaving the service of the assured, nor against death by ordinary sickness; they are not to be manacled or handcuffed, so as to prevent them from swimming."

1. The endorsement of negroes, including the one lost, has this memorandum attached to it: "The said negroes only insured against the dangers incident to navigation, *such as blowing up, drowning,*" &c.

The point assumed for the defence of the Insurance Company, and for which many authorities are cited, does not appear to arise in this case. The law which the counsel states, may be entirely correct, but it is not thought to be applicable to the claim now asserted by the plaintiffs; nor is it doubted but that the printed part of the policy in which the risks, assumed by the company, are enumerated, may be modified by the written endorsement, covering other risks, or relieving the company from some which would otherwise be embraced within the printed enumeration.

2. We must examine this memorandum, as intended to express the real scope of the obligation of the company, and while it professes to declare, that the company do not insure the property against any but the dangers incident to navigation, such as blowing up, drowning, &c., we must, at least, understand it as declaring, that the company is bound for the losses happening by blowing up and drowning. We take it to be an engagement to indemnify the owner of the slave, against a loss of his property, which may happen by the blowing up of the boat or the drowning of the slave. In other words, the company, in specifying the dangers incident to navigation, against which they insure, have included, "drowning," which is, in itself, not a "danger," but the result of a peril, and against that result they insure. We are not left to inquire what are perils of the river, or dangers incident to navigation, or whether the loss happened by an ordinary or extraordinary cause. The company has agreed that drowning, happen as it may, is a loss for which the assured shall be indemnified.

The judgment in this case must be affirmed.

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Warren & Dalton v. Julian H. Lusk.

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WARREN & DALTON, to use of Warren, Plaintiffs in Error,  
vs. JULIAN H. LUSK, Defendant in Error.

1. In the absence of the knowledge of what the law of a sister state is, on questions of common law, our courts presume that the law of such state corresponds with our own.
2. Under the act of Congress of May 26th, 1790, in a suit upon a judgment of another state, whose laws, as to the effect of judgments, correspond with our own, when it appears from the face of the record that the defendant appeared by his attorney, evidence to show that the attorney had no authority to appear, is not admissible.

*Error to St. Louis Court of Common Pleas.*

*J. C. Richardson*, for plaintiffs in error.

I. Judgments of sister states have the same force and effect in all the other states of the Union, that they have in the state where rendered. 1 Greenleaf Ev., section 504. 1 Kent, 260. *Mills v. Duryee*, 7 Cranch, 481.

II. The judgment or record imports absolute verity, and cannot be contradicted; it is conclusive upon both parties. Appearance by attorney cannot be contradicted. *Lindell v. Bank of Missouri*, 4 Mo. 228. *Weber v. Schmeisser*, 7 Mo. 600. *Vaughn v. Reed*, 15 Mo. 137. 1 Binney, 469, 214. *Field v. Gibbs*, 1 Peters C. C. 158. *Town of St. Albans v. Bush*, 4 Vt. 310, 68, (in point)—afterwards recognized by the same court in 17 Vt. 310, 532. *Rust v. Frothingham*, Breese, 260. *Lincoln v. Power*, 2 McLean, 483, (in which Judge McLean expressly dissents from *Starbuck v. Murray*, 5 Wend. 148.) *Westervilt v. Lewis & Looker*, 2 McLain, 515. *Halbert v. Montgomery's Adm'r.* 5 Dana, 16, (directly in point.) *Roberts v. Caldwell*, 5 Dana, 512. *Jones v. Hunter*, 4 Howard (Miss.) 342. *Miller v. Ewing*, 8 Smedes & M. 428, in which Judge Sharkey reviews *Hall v. Williams*, 6 Pickering, and *Starbuck v. Murray*, 5 Wend. 148, (directly in point.) *Bright v. Ross*, 11 Smedes & M. 300. *Munikuyson v. Dorsett*, 2 Harris & Gill, 377. *Denton v. Noyes*, 6 John. 297.

In Massachusetts it is held, that the authority to an attorney to appear in the courts of that state, cannot be contra-

dicted. *Smith v. Bowditch*, 7 Pick. 137. So, also, in New York, the record of a domestic judgment, showing an appearance by attorney, cannot be contradicted, 2 Hill 66. There can be no propriety, then, in discriminating against the judgments of a sister state, if the Supreme Court of the United States is to be followed in the declaration that the judgment of one of the states is of the same dignity in every other state, as in the one where it was rendered. 7 Cr. 481.

The New York and Massachusetts courts, and others under their lead, have held, that the judgments of other states were on the same footing as foreign judgments; that they were only *prima facie* evidence in favor of the party in whose favor they were rendered, and could be impeached on any ground that would have been available in the original suit. But, under the authority of the Supreme Court of the United States, it is submitted, that no defence can be made to a suit on a judgment of a sister state, which could not be made had the suit been brought in the state in which the judgment was rendered. *Mills v. Duryee*, and *Hampton v. McConnell*, 3 Wheat. 204.

The record does not derive its virtue from the fact of notice to the parties, but, in consequence of its being the judgment of a court of competent jurisdiction; and if the record can be assailed because there was no authority to the attorney to appear, with equal propriety the sheriff's return can be disputed; or any other fact which it will be presumed the court passed upon before the rendition of the judgment.

It is in proof, that as early as 1842, the defendant had knowledge of the decree against him, and if there was any irregularity in the proceeding, it was his duty to have sought relief by proper steps in the courts of Illinois. The plaintiffs had every reason to believe that the decree was final and conclusive. They took no steps to save their original demand from the operation of the statute of limitations, and the defendant ought not to be encouraged into the trap he set for them. He knew of the decree and made no objection to it;



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had no visible property out of which the decree could be enforced—but allows the decree to sleep in dangerous peace, and when the statute of limitation has barred an action on the original demand, and the plaintiffs attempt to enforce the decree, because they discover a hope to make it, the defendant is heard for the first time to say that the decree is a nullity, and if he succeeds in this court he may laugh at the plaintiffs if they venture upon the experiment, in the face of the statute of limitations, of bringing a suit upon the original demand.

III. The legitimate mode for relief against the unauthorized appearance by attorney, is, by a proper proceeding in the court which rendered the judgment, if the attorney is irresponsible. Peters C. C. 158. 2 McLain, 514. 2 Yeats (Pa.) 547. 6 Johnson, 297.

IV. But if the attorney is responsible, the defendant must look to him. 2 Breese, 260. 5 Dana, 16. 7 Pick, 138. 2 Harris & Gill, 378. 6 John. 34 and 297.

*T. Polk*, for defendant in error.

I. The record of the Illinois court, given in evidence by plaintiffs, showing that McDougal & McConnell filed a demurrer to the bill, in the name of both of the defendants, is not conclusive proof that Julian H. Lusk, the defendant in this case, appeared to the suit. It is only *prima facie* evidence and may be disproved. 1 T. R. 62. 6 Leigh, 570. 3 A. K. Marshall, 41. 4 Day's Conn. R. 380. *Aldrich v. Kinney*, 9 Mass. R. 462. *Bissell v. Briggs*, 6 Pick. 232. *Hall v. Williams*, 5 Wend. 148. *Starbuck v. Murray*, 5 Wend. 161. *Holbrook et al. v. Murray et al.* 6 Wend. 447. *Shumway v. Stillman*, 1 Ohio (Ham.) Rep. 124. *Spencer v. Brockway*, 6 Howard, 164. *Shelton v. Tiffin*.

To make a judgment binding on a party, he must either have been served with process or appeared to the action.

*J. A. Kasson*, for the same, contended, that with the single exception of proceedings *in rem*, a judgment cannot be valid, except when the defendant has had a legal opportunity to be heard, by means or notice served within the jurisdiction



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from which it issues, or by a voluntary appearance. The statute of 1790 does not affect judgments of other states, rendered without notice or appearance of the defendant. *Thurber v. Blackbourne*, 1 N. H. Rep. 242. 11 N. H. Rep. 304. *Bissell v. Briggs*, 9 Mass. R. 462. *Hall v. Williams*, 6 Pick. 232. *Gleason v. Dodd*, 4 Met. 338. *Holbrook v. Murray*, 5 Wend. 161. *Smith v. Ross & Strong*, 7 Mo. 465. *Moore v. Farrow*, 3 A. K. Marsh. 44. 5 Mason, 35, 42-3. *Sutton v. Hayes*, 3 Mo. 84.

A party is at liberty to put in issue the notice or appearance upon which the validity of the judgment depends, even where the record recites an appearance; unless it was a fact adjudicated upon, so as properly to partake of the nature of a judgment upon an issue. *Gleason v. Dodd*, 4 Met. 338. Story's Conflict of Laws, sections 608, 609. *Whittier v. Wendell*, 7 N. H. 259. *Shumway v. Stillman*, 6 Wend. *Noyes v. Butler*, 6 Barb. Sup. Ct. Rep. 615. *People v. —*, 5 Hill, R. 168. *Aldrich v. Kinney*, 4 Conn. 380. *Kelly v. Hooper*, 3 Yerg. 395. *Pritchard v. Clark*, 3 Harring. 517. *Wilson v. Mt. Pleasant Bank*, 6 Leigh, 570. — v. *Porter*, 3 Ham. O. Rep. 520. *Holt v. Holloway*, 2 Blackf. 108. *Shelton v. Tiffany*, 6 How. U. S. Rep. 186.

The provision of the U. S. constitution is nearly copied from the old articles of confederation. (See Art. IV.) It was proposed under those articles to make these judgments conclusive, but the motion was voted down. (See 1st secret journal of Congress, 386.)

*Glover & Campbell*, in reply.

As there is almost an indefinite amount of authority on both sides of this question, it is better to re-examine the subject on principle.

It is a maxim of the common law, that a record imports absolute verity, as to all parties to it, and therefore cannot be contradicted. This is not grounded upon any supposed infallibility of the ministers of justice, but on another maxim

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deduced from common experience : *Expedit reipublicæ ut sit finis litium.*

The defendant contends that he cannot be estopped by the act of an attorney who was not authorized to act for him.

But, the record says, it was "*his* attorney," and he cannot contradict it.

Why should a party not be concluded by the act of an attorney? An attorney, like the judge, clerk, or sheriff, is an officer of the court, acting under oath.

All the analogies of the law are against the position taken by the defendant, that he cannot be bound by the act of an officer of the court. When the sheriff returns a writ executed, though he has not executed it, the defendant is not allowed to put the truth of his return in issue.

If the clerk enters of record, that the defendant appeared, it admits of no denial. The acts of the judge, as entered of record, are to be taken as stated. Why should the acts of attorneys of the court be an exception?

Those cases which hold that, if the record says "the defendant appeared," that is conclusive; but, if it says, "defendant appeared by attorney," that is open to controversy, take a distinction not founded in reason. It assumes that the clerk must know the personal identity of all defendants, and that the case of a false personation is impossible.

The doctrine contended for, on the other side, is a trap for the unwary. If the judgment is voidable, it can only be avoided at the election of the defendant. The right to avoid is not reciprocal. The plaintiff, then, having been so unfortunate as to get such a judgment, has no recourse but to sue upon it, as he has done in this case. Had he sued on the original account, the judgment being voidable only, at the will of the defendant, might have been used as a defence. When he sues on the record, the defendant exercises his election and avoids it. In the meantime, the statute of limitations has barred the plaintiff's demand.

Again, suppose this unauthorized act of the attorney had

resulted in the defeat of the plaintiff's suit; the record being only voidable at the pleasure of the defendant, it would have concluded the plaintiff; but the result being unfavorable, the defendant avoids it. In other words, he stands by, sees the result of proceedings in his name, and then affirms or rejects, as motives of interest may dictate.

But, the plaintiff's case is still harder. Suppose Col. Warren had attempted to protect himself against all these consequences. Suppose he had required evidence, that the attorneys had the power to enter this very appearance. The court would have said: the presumption is, the attorneys have the power they exercise. 4 Shep. 224. 1 Scam. 291, 46. 3 Har. (Del.) 15. 4 Hump. 480. 9 Ham. 117. 1 Pike 99. 9 Ala. 557. 3 Mon. 194. 12 N. H. 489. 16 Maine, 228.

But if you will prove to the court affirmatively, that they have no power, or are abusing their power, then they will be required to show their authority. In such case, however, the statement of the attorney, on oath, will be sufficient. 7 Hals. 148. 15 John. 246. The plaintiff is forced to abandon this proceeding and to act upon a legal presumption arising out of the facts that the defendant has appeared.

Now, we contend that on plain principles of justice, whenever the law raises a presumption from considerations of public policy, out of an apparent state of case, and a party taking that state of case as true, *acts upon it*, the law supports him in it.

The question of jurisdiction of the person, is one on which the court passes, *and is obliged to pass*.

The doctrine we contend for, is the doctrine of our Missouri courts, and it is the true doctrine. 4 Mo. Rep. 228. 7 ib. 601. 10 Mo. Rep. 337. It may work some hardship, but will do more good.

It does not appear to us, that the great majority of cases ruled on this subject, have been decided in view of the evident meaning of the constitution of the United States. Sufficient attention has not been paid to the fact, that judgments of sis-

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ter states, are to have the effect in another state precisely which they had where rendered. Now, no relief could be had in Illinois against this judgment, except by motion to set it aside in the court that rendered it. 3 Gilman, 634. This accords with the opinion of this court. *Wood & Oliver v. Pemberton*, 10 Mo. Rep. 385. This might have been effected by continuing the case in the Common Pleas, till a motion could be heard in Illinois to set aside the judgment. This sensible doctrine has been boldly asserted in 2 Hill, 646. 17 Vermont, 309.

It is amusing and humiliating to see how strangely and wildly courts have ruled on this subject.

In New York, after vacillating to all points of the compass, it was held, 17 Wend. 484, a judgment was conclusive though there was neither process, record, nor appearance shown by the record.

The legal presumption is, that by the law of Illinois, this judgment is a legal and conclusive judgment. The defendant should have shown by the laws of Illinois, it was obnoxious to some objection. This law ought to have been produced, read to the jury, and made part of the bill of exceptions. It was not done. The only course, therefore, that remains, is to examine it by our own views of the common law, as expounded by our courts. These declare it conclusive.

SCOTT, Judge, delivered the opinion of the court.

This was an action of debt, on a decision rendered in the State of Illinois, against Julian H. Lusk & Edward Lusk, in favor of the plaintiffs in error. The plea was a formal one, without any meaning, under which, by the statute then in force, all defences to actions were required to be made. On the issue in the cause there was a verdict for the defendant, and after judgment the plaintiffs sued out their writ of error.

It appears from the record, on which this suit was instituted, that neither Julian H. Lusk, the defendant in this action, nor Edward Lusk, were served with the original process in the cause. The record states, that the defendants filed their

demurrer. The language of the demurrer is such, as would be employed by a plurality of persons, and is signed by the solicitors of the demurrants. At a subsequent day, the record recites, that "this day came the parties, by their solicitors, the defendants having filed their demurrer to the complainants' bill, &c." The demurrer was overruled, and leave given to the complainants to amend their bill; and Julian H. Lusk failing further to answer, the bill was taken *pro confesso*, as to him. Edward Lusk, on leave, withdrew his demurrer and filed a plea in his own defence. He finally got rid of the proceeding, and the decree against Julian H. Lusk was confirmed, and he was adjudged to pay the sum of \$3,238. The defence of Julian H. Lusk to this action is, that he was never served with process in the original suit; that he never appeared thereto in person, or by any authorized solicitor, and that he was not, at the time of the bringing of this suit, or at any time during its pendency, a resident of the state of Illinois. These facts being in evidence under the pleadings in the cause, a verdict was rendered for the defendant.

The only question in this case is, whether the defence offered by the defendant was admissible, in an action on a judgment or decree of a sister state, rendered under the circumstances detailed in the foregoing statement. When the mind, in considering a question, is relieved from the anxiety of taking a view of it which may be different from that entertained by all others, and is conscious that whatever course it may pursue, it will have the weight of respectable opinions in its support in forming a conclusion, under such circumstances it is the part of wisdom to ascend to first principles, and take that view which, while it avoids any encroachment on the established principles of law, is reconcilable to the dictates of sound policy. *Melius est petere fontem quam sectari rivulos.* When the nature of the human mind is considered, and its unwillingness to depart from ways of thinking to which it has been long accustomed, it is not remarkable that some repugnance should have been entertained by the old lawyers of the day, to the act

of Congress of 26th May, 1790, which, after presenting the mode by which judicial records shall be authenticated, declares, that the said record and judicial proceedings shall have such faith and credit given to them in every state within the United States, as they have by law and usage in the courts of the state from which such records are or shall be taken. Contemporaneously with the formation of the federal constitution, the question of the effect of foreign judgments was discussed in England and continental Europe, and different opinions in relation to it were entertained by eminent jurists. The opinion most favorable to their effect did not make them more than *prima facie* evidence of the justice of the demand which they evidenced. The legal mind had not progressed beyond this point. The framers of our constitution, having this state of things before their eyes, and reflecting on the intimate relations which would be created among the states of this confederacy, by the form of government about which they were deliberating, determined, that "full faith and credit should be given in each state to the public acts, records and judicial proceedings of every other state, and that congress should, by general laws, prescribe the manner in which said acts, records and proceedings shall be proved, and the effect thereof." It was in pursuance to this provision of the constitution, that the act above recited was passed; and the constitutional competency of congress to enact it has never been questioned, though some contrariety of opinion is entertained, as to the meaning of the words, "and the effect thereof," whether they related to the effect of the record or of the proof. But this is deemed unimportant. Now, it would seem, that whenever an action is brought on the judgment of a sister state, the first question that would present itself to the mind of him who was meditating a defence to it, would be, what plea could be set up against that judgment, if this suit had been brought in the state in which the judgment was rendered?

1. In the record of the case before us, the laws of the state of Illinois, giving effect to the judgment of her courts of gen-



eral jurisdiction, do not appear. We know that this is a matter regulated by the course of the common law, and in the absence of the knowledge of what the law of a sister state is, on questions of common law, it is an established principle of American jurisprudence, that our courts will presume that the law of such state, on such questions, corresponds with our own. *Holmes v. Broughton*, 10 Wen. 75. *Legg v. Legg*, 8 Mass. 99.

2. Now, if this were a domestic judgment, and suit was brought upon it, would it admit of question, that this defence would be inadmissible? In the case of *Hampton v. McConnell*, 3 Wheat. 234, Judge Marshall says: "The judgment of a state court should have the same credit, validity and effect in every other court of the United States, which it had in the state courts where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, *and none others*, could be pleaded in any court in the United States." In the case of *Landes v. Perkins*, 12 Mo. Rep., this court maintained, that a judgment could not be impeached in a collateral proceeding, by showing a want of jurisdiction of the person of the defendant; and the same judgment coming up in a kindred case, in the Supreme Court of the United States, that court held the same doctrine, and decided that it could not be impeached collaterally, and expressed an entire concurrence with the views on this point entertained by this court. *Landes v. Brant*, 10 Howard 371. We are free to admit, that there are decisions of courts, the eminence of whose judges entitle them to the greatest respect, which maintain that while the judgment of a sister state is conclusive, on the merits of the subject of controversy, yet, the facts which give jurisdiction of the person of the defendant, may be put in issue, and if it is found that they do not exist, the proceeding will be invalidated. The different views entertained of this matter are perplexing. Some of the courts hold, that if the appearance is entered as being in person, the fact cannot be contradicted, but that the authority of the attorney may be disproved, when

the appearance is by attorney. Others reject this distinction, and admit proof of facts showing the want of jurisdiction over the person of the defendant, let the recitals be as they may ; while there is not wanting a considerable weight of authority in support of the opinion, that when it appears from the face of the record that the defendant had notice of the proceedings, that fact could not be controverted, as a record imports absolute verity. To this opinion we incline, as being consonant to the established rules of law. In considering this matter, it is well enough to look somewhat to the rights and interests of plaintiffs, as well as defendants. If a judgment is obtained against a defendant in one state, and he afterwards removes to another and is sued on the original cause of action, he may, it seems, plead the former recovery in bar of the action. *Green v. Sarmiento*, Pet. C. C. R. 74. It is not perceived how one, who appears as plaintiff in such a record as that in the present case, would show its invalidity, if the defendant would hold him to it. The original cause of action being merged in the first judgment, if the plaintiff sues on it, he may be defeated by the defendant, using the judgment as conclusive against him ; while if he sues on the judgment, the defendant may impeach its validity, by denying the existence of the facts which conferred jurisdiction. So there is no reciprocity in the thing. The plaintiff is bound by the record, and the defendant is bound or not, as it suits his purposes. If he is sued upon the original cause of action, the plaintiff is defeated by the production of the record ; if upon the record, he is permitted to show its nullity, by controverting the facts which confer jurisdiction. The proceedings on a writ of error at common law, furnish no argument in favor of the notion, that the authority of an attorney to appear for a party to the record may be controverted. By the common law, the want of a warrant of attorney, which was an instrument under seal, might be assigned for error, as might the want of the original writ, declaration, or any other paper necessary to perfect the record. But that is a very different thing from dis-

puting the fact, that the attorney had authority to enter an appearance for a party. The want of a warrant of attorney is now cured by the statute of jeofails. No matter, tending to negative the appearance of an attorney, or of his authority to appear, could be assigned as error to obtain a reversal of the judgment. *Bradburn v. Taylor*, 1 Wil. 85. *Norris v. Fletcher*, Croke, Carr, 53. But where is this matter of disputing the verity of the record to end? If the authority of the attorney may be denied, why not deny the identity of the defendant with the person appearing, for he may be personated? So, the sheriff may be mistaken and summon another person for the defendant; and he may, in effect, have no notice of the proceedings. Can any reason be given why one of these facts should be controverted and not the other? There would seem to be no distinction between the cases. Terming one of the facts a recital, does not make a difference. Recitals are a part of the record. Story and Kent, in their commentaries on the constitution, say, that the truth of the facts, which give jurisdiction of the person of the defendant, may be denied, in order to destroy the effect of a record; but they do not say that this can be done when the effect of it may be to impeach the verity of the record. If a judgment should be rendered against a party, and it should appear upon the face of the proceedings that he had no notice of them, their doctrine might come into play; but we cannot overturn the solemn decision of the Supreme Court of the United States, whose province it is, under the constitution, to settle the question, for the opinion of any commentator, whatever respect may be entertained for his learning and abilities. Nor should consequences be entirely disregarded in settling this question. If a judgment in one state is the extinction of the original cause of action, when suit is brought on it in another, we may easily perceive the difficulties that will be interposed to the recovery of just demands, by permitting the verity of records to be impeached, now that the facilities for travelling have been so multiplied and space annihilated, as it were, by the improved modes of transportation,

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puting the fact, that the attorney had authority to enter an appearance for a party. The want of a warrant of attorney is now cured by the statute of jeofails. No matter, tending to negative the appearance of an attorney, or of his authority to appear, could be assigned as error to obtain a reversal of the judgment. *Bradburn v. Taylor*, 1 Wil. 85. *Norris v. Fletcher*, Croke, Carr, 53. But where is this matter of disputing the verity of the record to end? If the authority of the attorney may be denied, why not deny the identity of the defendant with the person appearing, for he may be personated? So, the sheriff may be mistaken and summon another person for the defendant; and he may, in effect, have no notice of the proceedings. Can any reason be given why one of these facts should be controverted and not the other? There would seem to be no distinction between the cases. Terming one of the facts a recital, does not make a difference. Recitals are a part of the record. Story and Kent, in their commentaries on the constitution, say, that the truth of the facts, which give jurisdiction of the person of the defendant, may be denied, in order to destroy the effect of a record; but they do not say that this can be done when the effect of it may be to impeach the verity of the record. If a judgment should be rendered against a party, and it should appear upon the face of the proceedings that he had no notice of them, their doctrine might come into play; but we cannot overturn the solemn decision of the Supreme Court of the United States, whose province it is, under the constitution, to settle the question, for the opinion of any commentator, whatever respect may be entertained for his learning and abilities. Nor should consequences be entirely disregarded in settling this question. If a judgment in one state is the extinction of the original cause of action, when suit is brought on it in another, we may easily perceive the difficulties that will be interposed to the recovery of just demands, by permitting the verity of records to be impeached, now that the facilities for travelling have been so multiplied and space annihilated, as it were, by the improved modes of transportation,

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making the states of the union occupy the same position to each other, as it respects distance, as was formerly occupied by the counties of the same state.

It sufficiently appears upon the face of the record, that the court had jurisdiction of the person of the defendant, and if suit had been brought on such a judgment rendered in our own courts, the fact of notice could not be controverted; so the laws of Illinois, being the same as ours with respect to the effect of judgments, in a suit on a record from that state, the truth of a fact appearing on the record, cannot be controverted. The defendant is not without redress. In the court in which this judgment was rendered, it may be set aside, if the facts are as alleged. This is the most equitable mode of disposing of this controversy. Such a motion is addressed to the discretion of the court, and in acting upon it, the parties may be laid under terms, which will subserve the ends of justice. He was a resident of Illinois and made the contract concerning real estate which has given rise to this controversy in that state, and we are not satisfied but that the ends of justice will be promoted by remitting him to the jurisdiction of the *lex loci rei sitæ*.

No question was made, as to the right of a party to maintain an action on a decree for the payment of money. It was not controverted. The other Judges concurring, the judgment will be reversed.



McDERMOTT, Appellant, vs. BARNUM & MORELAND, Respondents.

1. The delivery of a slave, on a bailment by way of loan, does not subject the property to the debts of the bailee, until possession shall have continued five years under the loan. (R. S. 1845, 527.)
2. A. "delivers personal property to B. and permits him to retain possession of, and use and control it as his own." *Held*. These facts do not amount to fraud in law, but are only evidence of fraud, to be passed upon by a jury.
3. When, under such circumstances, the property is sold under execution as B's, A. is not estopped from claiming it as his own.



*Appeal from St. Louis Circuit Court.*

THIS was an action in detinue for a slave named Austin.

John C. Rogers, Hugh Rogers and Lowe, (composing the firm of J. C. Rogers & Co.,) and also the plaintiff, McDermott, were contractors on the James River Canal in Virginia, 1841 and 1842. The former becoming embarrassed, sold various slaves to various creditors, among others, to the plaintiff : a bill of sale for four negroes (among them Austin) for \$2000, was made to Rodk. McDermott, and was signed by Jno. C. Rogers & Co., by J. C. Rogers, on the 24th of Jan'y, 1842. Reilly, a witness to the bill, testified that the negroes were present at the sale, were delivered to the plaintiff and went to work for him : he identified the bill of sale, to "Rodk. McDermott," as the one made on that occasion. The negroes remained, working for the plaintiff, about two weeks in Virginia, and until they were sent off in charge of Janney. Janney, then clerk of Rogers & Co., testified that they owed plaintiff for goods to a large amount—over \$2000, as he thought ; they agreed to sell plaintiff four negroes, among them Austin, in payment or part payment of the debt. The negroes had been previously taken on attachment, which had been dissolved before that sale. Janney saw the slaves delivered to plaintiff. Afterwards, plaintiff delivered them to Janney to carry to Montgomery, Alabama, to sell, and to remit the proceeds to the plaintiff. When Janney left Virginia, Rogers & Co. were considerably indebted ; they left some property there, but how much, Janney could not say. He took the negroes sold to plaintiff, and also others sold at the same time by Rogers & Co. to McKinney, and carried them to Montgomery county, Alabama, along with some negroes he had also received from that firm as a creditor. Rogers & Co. remained in Virginia when Janney left, but Hugh Rogers overtook him in North Carolina, and they went together to Montgomery. There, Janney sold McKinney's negroes and sent the proceeds to *John C. Rogers in North Carolina*, to be sent to McKinney,

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but he does not know that McKinney ever got the money; does not know if McKinney's directions were to send the money to Rogers, but his directions were to remit it. Janney sold some of the negroes of the plaintiff, at Montgomery, and after paying his expenses, put the money in his pocket. Not selling all the negroes at Montgomery, because the prices offered did not suit him, and hoping to get better prices, he sent the rest by *J. C. Rogers to Hugh Rogers* at Mobile, with directions to sell plaintiffs' negroes and remit the proceeds to McDermott. Among them was Austin. Janney never sold Austin to anybody. Janney and Hugh Rogers married sisters of Lowe, one of the firm of J. C. Rogers & Co.

Hugh Rogers at Mobile had blooded stock for sale, and with the stock went to New Orleans and thence to St Louis, arriving here 10th of April, 1842; and in Mobile, and on the way, and in St. Louis, Austin attended on the horses. At St. Louis, in 1842 and 1843, Hugh Rogers claimed Austin as his property; hired him out and offered to sell him; he also used him in a stable which he kept. The negro was subsequently, in the fall of 1843, taken on attachment, sold and purchased by Barnum and Moreland. McDermott was pretty well off; was known as Rory or Rod, or Roderick McDermott, and used to sign his name "R. McDermott."

The defendants gave in evidence transcripts of judgments before justices of the peace in St. Louis in 1843, in the cases of *John T. Martin vs. Hugh Rogers* and *P. McDonald*; and two other cases against Hugh Rogers; also a bill of sale, acknowledged and recorded, of a slave named Austin, to defendants, by constable Rule of St. Louis township, dated 11th of November, 1843, stating that he had seized a negro named Austin, as the property of Hugh Rogers, and in virtue of the execution in *Martin vs. Rogers & McDonald*, had sold him at public sale to the defendants.

To the introduction of this testimony, the plaintiff objected; the objection was overruled and exception taken at the time.

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The defendants also introduced in evidence a bill of sale of a negro named Austin, to John C. Rogers by Hugh Rogers, at St. Louis, August 30, 1842; and the records of two suits of Childs *vs.* J. C. Rogers & Co. in the St. Louis Court of Common Pleas, for the November term 1842; for debts claimed to be due him by that firm. A slave named Austin, and another, were attached in these suits as property of the firm. John C. Rogers interpleading and claiming the negroes, the verdict was, that when attached they were not the property of John C. Rogers. What became of the original suit does not appear.

The defendants also introduced evidence to show, that Hugh Rogers had, in St. Louis in 1842-3, claimed Austin as his slave, hired him out, offered him for sale, and, generally, acted as owner of the slave.

To the evidence of Schultz, a witness for the defendants, plaintiff objected, and the objection being overruled, excepted.

The verdict was for the defendants. The plaintiff moved for a new trial on the usual grounds; the motion was overruled, to which the plaintiff excepted and appealed to this court.

The court gave the following instructions for the defendant:

1. Unless it is proved to the satisfaction of the jury, that Rodk. McDermott, named in the writing of the date of January 24, 1842, is the plaintiff and not another person, then said instrument is inoperative to convey to the plaintiff a title in the slave in the declaration mentioned.

2. If the jury find, from the evidence, that the instrument of writing, under which the plaintiff claims, of the date of the 24th of January, 1842, was executed by John C. Rogers, and accepted by the plaintiff, with intent to hinder, delay or defraud the creditors of John C. Rogers & Co., then the said writing is fraudulent and void, as against the creditors of said firm and of the members thereof.

3. It is not necessary that the fraudulent intent should be proved positively, but if, from all the circumstances, it appears to the satisfaction of the jury that such fraudulent intent existed on the part of the plaintiff, and the vendor or vendors in said bill of sale, at the time of the making thereof, it is sufficient.

4. If the jury find that the plaintiff, by himself or his authorized agent, delivered the slaves in the declaration mentioned to Hugh Rogers, one of the firm of John C. Rogers & Co., and suffered or permitted him to retain the possession of, and use and control the said slave as his own property, that while said Rogers was so in possession of said slave, using and controlling him as his own, he was regularly levied on and sold, to satisfy one or more executions against said Hugh Rogers, that the defendants became the purchasers of said slave at such sale, without any notice of the claim of the plaintiff, the verdict ought to be in favor of the defendants; but if the delivery was not the act of the plaintiff nor authorized by him, he is unaffected by it or the subsequent possession of Hugh Rogers, unless it appears to the jury from the circumstances, that he had knowledge of the acts of his agent and acquiesced in them.

To the giving of these instructions, the plaintiff by his counsel, objected, but the court overruled his objection, to which the plaintiff at the time excepted.

The court gave the following instructions for the plaintiff:

1. Fraud, in fact, is to be passed upon by the jury. He who attacks a transaction on this ground, must establish it by evidence to the satisfaction of the jury. This may be accomplished by proof direct and positive; or, as already stated, by the disclosure of such facts and circumstances as in themselves lead to that conclusion. But the jury are not authorized to infer the existence of fraud, unless there be some evidence in the case, rendering such inference reasonable, or from which fraud may be deduced.

2. As a general rule, a purchaser at a sheriff's or constable's sale, is not protected in his purchase, if the property he buys does not belong to the debtor, but to another. The jury are referred to the fourth instruction given for the defendants, to determine the exception to this rule, or under what circumstances and conditions, if actually shown to exist, the true owner of property may, nevertheless, be displaced or be compelled to yield to the claim of a third party shown to have purchased at such sale, and without knowledge or notice of the true owner's rights.

3. If the jury find, from the evidence, that "Rodk." is but an abbreviation of a name which is used as an alias of or interchangeably with "Roger," then the jury will regard the bill of sale in the same light as if the latter never had been employed.

4. That although the jury shall believe, that Hugh Rogers got possession of the negro Austin, in Mobile, Alabama, and did bring him to this place, and did here represent said negro as his, and did offer to sell him, or did actually sell him, yet, if they believe, from the evidence, that the said negro was the property of the plaintiff at the time he came into the possession of said Rogers, and that the plaintiff did not give authority or permit or sanction the acts and doings of said Rogers, in regard to said negro, then, his right and title to said negro was in no wise affected or impaired thereby.

The following instructions, asked by the plaintiff, were refused :

If the jury believe from the evidence, that Roger McDermott, the plaintiff, did, in the year 1842, purchase the negro Austin, from John C. Rogers & Co., for a valuable consideration, or receive him in payment or part payment of a debt due said McDermott by Rogers & Co., McDermott's title to the negro, as between these parties, was good, and he is entitled to a verdict, unless he has disposed of the negro, by himself or his duly authorized agent, to the defendants or some other person.

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And if said McDermott, after acquiring said negro from Rogers & Co., sent said negro by his agent to Alabama to be sold for him, in Montgomery or Mobile, and, contrary to the tenor of such agency, he was carried off to New Orleans and St. Louis, the title of McDermott is not lost to him, even against a *bona fide* purchaser for valuable consideration.

One who buys personal property buys at his peril, and he must take care for himself that he purchases of one really having a title or fully authorized to sell, otherwise he will lose the property as against the real owner. And this rule not only holds as to ordinary purchases, but also as to sales by sheriffs and constables.

That even though the jury should believe from the evidence, that the plaintiff had knowledge of the fact that Hugh Rogers had the possession of the boy Austin, and was exercising acts of ownership over him, at St. Louis, and if whilst the said Rogers was so exercising acts of ownership over him, he was sold under execution against said Rogers as his property, and purchased by the defendants without notice of the plaintiff's claim, nevertheless, the plaintiff did not thereby lose his title as against the defendants, unless the plaintiff fraudulently permitted the said Rogers to retain the possession and exercise acts of ownership over the said boy, with the design to enable the said Rogers to obtain a false credit thereby, or practice other frauds by means thereof; and provided, also, that the plaintiff was not present at, and had no knowledge of the sale to the defendants.

*Thos. C. Reynolds*, for appellant.

The fourth instruction given for the defendants is confused, improper, calculated to mislead the jury, and is not law. The principle which may be extracted from it is this: If the plaintiff, or his authorized agent delivered the slave to Hugh Rogers, one of the firm of Rogers & Co., or if it appears to the jury, from the circumstances, that the plaintiff had knowledge of the acts of his agent and acquiesced in them, though the delivery of the slave was neither the act of the plaintiff nor



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authorized by him, and suffered or permitted Rogers to retain the possession of, and use and control the said slave as his property, and while so used, the slave was regularly levied on and sold, to satisfy one or more executions against Rogers, and at such sale defendants bought the slave without notice of the plaintiffs' claim; the verdict ought to be in favor of the defendants.

The instruction is contrary to Revised Statutes, chap. 67, sec. 5, (the R. S. of 1835 contain the same.) The instruction requires that the plaintiff knew of, and acquiesced in the acts of his *agent*, but not those of Rogers. The words "suffer or permit" are too vague; a jury might easily construe a mere failure or omission to sue, into a permission or suffering of an act which the plaintiff never knew of: the idea, perhaps, intended, could have been better conveyed, had the words "acquiesce in" been used. The words, "use and control as his own property," are liable to the same objection of vagueness. They apply in common parlance to a bailee for hire. In any sense in which they may be taken, the instruction is not law: *Hoare v. Parker*, 2 T. R. 376. *Hoffman v. Carow*, 2 Wendell, 285. *Saltus v. Everett*, 20 Wend. 267. The instruction also leaves out the question of fraudulent intent on the part of the plaintiff in so "suffering and permitting," &c. It excludes also all other questions, the validity of the judgments on which execution was issued, the points raised in other instructions, &c.; and directs the jury, on the finding of those facts alone, to give a verdict for the defendants. *Morrison v. Dent*, 1 Mo. 176.

This instruction also contradicts the fourth instruction given for the plaintiff. It leaves to the jury a law question, i. e., the regularity of levy and sale.

*T. Polk*, for respondent.

The fourth instruction given by the court on the prayer of the respondents, advances a correct principle of law, applicable to this case: because,

*First.* It is reasonable and just.

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*Secondly.* It is sustained by authority. *Meaux v. Caldwell*, 2 Bibb, 244.

*Thirdly.* It is adopted by the plaintiff as his own, by his second instruction, prayed by him and given by the court.

Even in case of real estate, if a person claiming it stands by, while another is about purchasing it, without disclosing his claim, he cannot afterwards be allowed to set up his claim against the purchaser. 2 John. R. 253.

That if one permits another to hold himself out to the world as having not only the possession but the property in chattels and the indicia of title, the other may sell and possess the title thereto. Broom's Legal Maxims, 367. (This work is found in the New Library of Law-Equity.) *Dyer v. Pearson*, 3 B. and C. 43, (10 Eng. C. L. R. 15). *Boydon v. Coles*, 6 M. and Sel. 23-4.

GAMBLE, Judge, delivered the opinion of the court.

The only ground upon which we reverse the judgment in this case, is, the giving, by the Circuit Court, of the fourth instruction asked by the defendants. That instruction is in these words :

4. If the jury find that the plaintiff, by himself or his authorized agent, delivered the slave in the declaration mentioned, to Hugh Rogers, one of the firm of John C. Rogers & Co., and suffered or permitted him to retain the possession of, and use and control the said slave as his own property ; that, while said Rogers was so in possession of said slave, using and controlling him as his own, he was regularly levied on and sold, to satisfy one or more executions against said Hugh Rogers, that the defendants became the purchasers of said slave at such sale, without any notice of the claim of the plaintiff, the verdict ought to be in favor of the defendants ; but if the delivery was not the act of the plaintiff, nor authorized by him, he is unaffected by it or the subsequent possession of Hugh Rogers, unless it appears to the jury from the circumstances, that he had knowledge of the acts of his agent, and acquiesced in them.

1. This instruction cannot be maintained, on the ground that the plaintiff delivered the slave to Hugh Rogers, on a bailment by way of loan, for such loan does not subject the property to the debts of the bailee, until possession shall have continued five years under the loan. Revised Code, 527.

2. Nor can the instruction be maintained on the ground that the circumstances stated in the instruction establish fraud in the transaction in which the plaintiff acquired the title, which he now asserts; for, however strong evidence the circumstances may furnish of the fraudulent character of that transaction, they do not render it fraudulent in law, but are to be left to the jury, as evidence from which they may be satisfied that the transaction was, in fact, fraudulent.

3. Nor can this instruction be supported on the ground that the acts of the plaintiff, mentioned in the instruction, estop him from claiming the property, after it was sold as the property of Hugh Rogers; for the only acts of the plaintiff, which the jury are called upon to find, are, that he delivered the slave to Hugh Rogers, and suffered and permitted him to retain the possession of, and use and control the said slave as his own property. This might be done while Rogers was but a bailee, and while the right to the property was unquestionably in the plaintiff. If the defendants had intended to rely upon an estoppel by the acts of the plaintiff, there must be something more specific than that the plaintiff "suffered and permitted" another "to use and control the slave as his own property."

In every aspect in which this instruction is viewed, it is erroneous, and it is not aided, as the defendants contend, by the reference to it in the second instruction given for the plaintiff. It appears that the instructions for the defendants were first given, and then the plaintiff could do nothing better than endeavor to qualify the error of the court, by asking instructions which would take the law as already declared by the court, and modify it so as to suit his case. By doing this, he did not waive his right to object to the error in the instruction already given for the defendants, and to which he had excepted.

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Shelton and Heatherly v. Maupin.

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The judgment will be reversed on account of this fourth instruction, with the concurrence of the other Judges, and the cause will be remanded for further proceedings.

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SHELTON and HEATHERLY, Respondents, *vs.* MAUPIN, Appellant.

1. Although a survey of the United States within a confirmed claim is of no force against the claimant, yet, when he adopts the survey, as designating any portion of his land, it may furnish a valid description, by which he may convey such portion.
2. A deed which refers for a description of the land conveyed, to a plat which shows a river to be one of the boundaries, is to be construed as if such a call was expressed in words in the body of the instrument.
3. When a deed, made either by the Government or an individual, calls for a river as a boundary, the tract must have that boundary, although it does not correspond with the established corners and monuments.

*Appeal from Franklin Circuit Court.*

*Frissell & Jones*, for appellant, insist,

1. That Shelton and Heatherly are to be confined, strictly, to fractional section thirty-four, as laid down upon the plat in the register's office, from the field notes made by the United States surveyor, at the time that part of the country was sectionized in 1817.

2. That the appellees can receive no benefit from alluvion adjacent to fractional section thirty-four, formed prior to their purchase from Labaddie in 1844. The section lines within Labaddie's private survey were of no authority, further than he saw proper to recognize them. He did, in his bond for title to the appellees, recognize the lines of said fractional section, as they appeared upon the plat in the register's office. He also conveyed to Maupin the land which lay between that section and the river. There is no conflict between the tracts conveyed to Maupin, and Shelton and Heatherly. *Davis v. Rainsford*, 17 Mass. Rep. 208. *Magoun v. Lapham*, 21 Pick. 135.

*Stevenson*, for respondents.

1. Shelton and Heatherly are entitled to the entire fractional section thirty-four, with the Missouri river as a boundary, the

survey under which they purchased calling for the river as the terminus of both the west and south lines of said section, and the river being the northeast boundary. Accordingly, the land conveyed to Maupin, being embraced within said section, is the land of the respondents.

2. The land, as claimed by Maupin, being embraced within fractional section thirty-four, he, having notice both of purchase and possession by Shelton and Heatherly, his deed must be declared void, and the title must vest in the respondents.

3. Taking the terminus of the south lines of fractional section thirty-four, by chains and links, the rule of the government survey being, that lines should run to the cardinal points, the respondents are still entitled to all accretions north of fractional section thirty-four, as thus described.

GAMBLE, Judge, delivered the opinion of the court.

Sylvester Labaddie had a Spanish grant for a tract of land situated in Franklin county, which was confirmed by the act of Congress of 4th July, 1836. In 1817, the land embraced by this grant had been surveyed as public land, and the plats of the survey had been regularly made and sent to the office of the register of the land office. By the plat thus filed, fractional section thirty-four, township forty-five, of range two, west of the fifth principal meridian, appeared to be bounded by the Missouri river, and to contain one hundred and fifty-eight acres. On the 31st of January, 1844, Labaddie made his bond to Shelton and Heatherly, acknowledging the receipt of a part of the consideration money for the purchase of fractional section thirty-four, and the northeast quarter of fractional section thirty-three, and also of notes for the balance of the money, and binding himself to convey the said land to them, "as the same is described in the books of the register of the land office, for the district of lands subject to sale at St. Louis, Missouri." The defendant, Maupin, on the 28th of January, 1848, purchased from Labaddie a piece of land, which, by its description, was supposed to be between the land of Shelton and Heatherly and the Missouri river. The idea

upon which this purchase was made was, that the United States survey of fractional section thirty-four was, in fact, so made, that its lines did not run to the Missouri river ; or, that if they were so run in 1817, when that survey was made, there had been alluvial accretions made in front of section thirty-four, since the survey, which would not be comprehended in the sale made by Labaddie to Shelton and Heatherly. This purchase by Maupin was made with a knowledge of the sale to Shelton and Heatherly ; for Labaddie, when Maupin applied to purchase, did not believe he had any land between that sold to S. and H. and the river, until Maupin procured a survey to be made, exhibiting upon the plat a strip of land between section thirty-four and the river. Labaddie, afterwards, on the payment of the purchase money by S. and H., made a deed to them on the 21st of April, 1848, for the land he had sold to them, as evidenced by his title bond, describing it as fractional section thirty-four, and the northeast fractional quarter of fractional section thirty-three.

If the survey were now made of the section, by extending the lines to the river, it would still be made fractional by the river, and all the land in controversy would be included in fractional section thirty-four. The survey of Labaddie's claim under the confirmation, which was executed in 1837, and which Maupin, in his answer, says was not filed in the register's office, until after the purchase from Labaddie was made by Shelton and Heatherly, exhibits the previous surveys made by the United States within its boundaries, and shows fractional section thirty four as extending to and bounded by the river. The whole question in the case is, whether if it be true, that the surveyor, in running the sectional lines in 1817, did not, in fact, extend the south and west lines of the fractional section to the river ; or if, since that survey, there have been accretions in front of the fraction, so that the corners originally established by the surveyor on the bank of the river, are now distant from the stream, the sale to Shelton and Heatherly in 1844, would pass the land to the river.



The Circuit Court, ascertaining that the southeast corner of the fractional section, as originally established, is not now at the bank of the river, held, that that corner was to be taken as the farthest eastern point of Shelton and Heatherly's purchase, and that a line should be run from that corner due north to the river, and that they should have title to the land west of such line. This decision divides the land in controversy between the parties, and leaves Maupin in the enjoyment of a portion of his purchase.

In the progress of the trial, various plats of surveys were introduced by the parties, and among them, a plat of the original survey, as made in the year 1817, showing the fractional section as bounded by the Missouri river, on its northeast side. It may be observed here, that a section of land, as surveyed by the United States, can only be fractional by the interference of other surveys, known to and recognized by the United States, or by a river, across which the lines of survey are not extended. A section, made fractional by the Missouri river, must, of necessity, have that stream for one of its boundaries.

1. It may be admitted, that the surveys made by the United States, within the claim confirmed to Labaddie, are of no value or force as against him, yet, when he adopts the survey, as designating any portion of his tract, it may furnish a valid description by which he may convey such portion.

2. In the present case, the sale to Shelton and Heatherly was not merely by reference to the survey of fractional section thirty-four, as made by the United States, but by a specific reference to the books in the register's office, as they exhibited that section. This reference has the same effect in describing the land sold, as if a diagram, corresponding with the plat in the register's office, had been annexed to the deed or bond, and referred to for a description of the premises. If the plat in the register's office, at the time of Labaddie's sale to Shelton and Heatherly, showed the Missouri river as the northeastern boundary of the fractional section, then the bond is to be con-

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strued, as calling for that stream as its boundary, with all the effect that such call would have, if expressed in words in the body of the instrument.

3. It is true, that this court has held, that the corners and monuments established, in running the United States surveys, shall control the course and distance of the lines which inclose any given subdivision of the public lands ; but when, in an instrument made either by the government or an individual, a boundary, such as a river, is called for, the tract must have that boundary. If a mistake has occurred, such as a court of equity will correct, the party alleging such mistake must apply to the proper tribunal to correct it, but where there is no such allegation, the calls of the instrument must be taken, as expressing the intention of the parties.

In the present case then, without enquiring whether there has been any alluvial accretion, or what was the condition or course of the river in 1817, when the United States survey was made, it is believed to be the clear effect and operation of the sale by Labaddie to Shelton and Heatherly, to pass to them all the land which is in fractional section thirty-four having for the northeast boundary of the section the Missouri river ; this being the effect of the reference to the books in the register's office. In order to make the sale effectual, the south line of the section, which, according to the original survey, as exhibited in this court, extended to the Missouri river, is still to be extended east to the river, if the distance does not exceed a mile from the southwest corner of the section ; and then all the land to the north of that line and between it and the Missouri river, is to be considered as sold to the plaintiff.

This view of the case is taken, upon the assumption, that at the time of the sale by Labaddie to the plaintiffs below, there was nothing in the register's office to change the effect of the plat of the original survey made in 1817, and that that plat was the one then in that office, to which reference was made in the bond to Shelton and Heatherly. As that plat shows the Missouri river as bounding the section from its northwestern to

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its southeastern extremity, and shows the southeast corner of the section on the bank of the river, the bond is construed to cover all the land within section thirty-four, which lies north of its south line, continued to the river.

As the decree of the Circuit Court passed to the plaintiffs, Shelton and Heatherly, the legal title which Maupin acquired by this deed from Labaddie, to so much, only, of the land in controversy as was west of a line running due north from the original southeast corner of the section, as fixed in 1817, to the river, it is inconsistent with the rights of the parties, as they are ascertained by this court; and its decree will, therefore, be reversed, and the cause will be remanded, in order that the Circuit Court may give full effect to the bond made by Labaddie to Shelton and Heatherly, as its effect is declared. In giving the decree, the Circuit Court will be governed by the plats and books in the register's office, showing the boundaries of section thirty-four, when Labaddie's bond to the plaintiffs was made; and if the evidence shows, as is now shown to this court by the plat of the survey of 1817, that the southeast corner of the fractional section appeared upon the plat in that office to be on the bank of the river, and that the entire front, from that corner to the northwest corner of the section, was bounded by the river, then the south line of the section is to be run east to the river, and all the land north of that line, and between it and the river, which lies in fractional section thirty-four, as that fractional section would now be surveyed, must be decreed to belong to the plaintiffs in fee simple.

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BRANT, Plaintiff in Error, *vs.* ROBERTSON, Defendant in Error.

1. Under the new code, where a case has been tried by the court below, without a jury, and the finding of facts is incomplete on its face, the case will be reversed.
2. No conveyance can be a mortgage, unless it is made to secure the payment of a debt, or the performance of a duty, either existing at the time the conveyance is made, or to be created or to arise in the future.
3. To determine whether a transaction was a conditional sale or a mortgage, courts will look, not only to the deeds and writings, but to all the circumstances of the contract, to

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ascertain the real intention of the parties. If the intention is doubtful, it will be held as mortgage, as this construction is more just and equitable.

4. Under the 5th clause of the 14th section, of the act concerning executions, (R. S. 1845,) where A. has agreed to convey land to B., and B. has agreed to pay for it, or has paid for it in whole or in part, B. has such an interest in the land as may be sold on execution.

*Aliter*, If B. has paid no money and is under no obligation to pay.

*Error to St. Louis Circuit Court.*

The opinion of the court contains a sufficient statement of the facts.

*T. T. Gantt*, for plaintiff in error.

I. Robertson, at the time of the sale by the sheriff, being in possession of the premises under a contract of sale, had a legal interest therein, saleable on execution. Rev. Code of 1845, sections 2 and 66 of ch. 61, p. 475, 488. *Benton v. Mullanphy's Exr.* 8 Mo. R. 650.

Such an interest is saleable on execution, even in those states in which a merely equitable estate cannot be sold by the sheriff. *Jackson v. Parker*, 9 Com. 73. *Jackson v. Scott*, 18 Johns. 94. A mere equitable estate not being at that time saleable on execution in New York. 5 Cow. 485. *Jackson v. Chapin*.

II. This possession of the defendant in error, thus being a legal estate, all equitable interests belonging to him, or accruing to him from any source, were united to and merged in it: and all his estate, legal and equitable, passed by the sheriff's deed. *Goodright v. Wells*, Douglas' Reports, 741. Rev. Code of 1845, p. 475, 488. 8 Mo. Rep. 650. *Burton on Real Property*, 426.

III. Under our laws, all interest and title in and to real estate, is saleable on execution. The second section of an act concerning executions, approved February 1, 1839, (September acts of 1839, p. 43,) defines "real estate" to signify "all interest of the defendant, or any one to his use, held or claimed by virtue of any deed, bond, covenant, or other writing for a conveyance or as a mortgagor or mortgagee in fee, for life, or years."

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The act of 1845 says more concisely, but not less comprehensively, that the term "real estate" shall be construed to include "all interest and estate in lands, tenements and hereditaments." Rev. Code, section 66, page 488, chap. 61. The words "estate and interest," and still more, "*all* estate and interest," are the most comprehensive known to the law. (1. Inst. 345. A. 6 Cru. Digest, 230, sec. 24.) If Robertson, then, had any interest or estate in the land, under the contract, legal or equitable, it passed by the sheriff's deed to Brant: and so passing, it operated as a release of the covenant, or a discharge of it. 1 Cruise's Digest, 457. *Goodright v. Shales*, 2 Wilson's Rep. 329. Burton on Real Property, 426.

IV. Robertson had an equitable interest and estate in the land, by virtue of the contract of conditional sale. 2 Story's Equity, 23. Atkinson on Titles, 32-33. Burton on Real Property, 487-488.

Even before election made by the covenantee to complete a contract of purchase, which he alone can enforce, the interest which he has by virtue of the contract, is treated in equity as "real estate." Atkinson on Titles, p. 41-42. 14 Ves. 590. *Townley v. Bidwell*. But as before stated it must, if it be real estate in this sense, have passed by the deed of the sheriff to Brant. 8 Mo. Rep. *McNair v. O'Fallon*, 188. 8 Mo. Rep. *Benton v. Mullanphy's Exr.* 651. Rev. Code of 1845, p. 488.

V. It was said, in the argument of the question before the Circuit Court, that until election made and tender of the price, Robertson's interest in the land was a mere *chose in action*. So in one sense, is the right of action for covenant broken, even when the covenant will be specifically performed by a court of equity. If the covenantee goes to a court of law, nothing but his right to damages is recognized. Thus his rights there are a mere "chose in action." But if he resorts to a court of equity for specific performance, that court recognizes his *equitable* title to the thing contracted for, and compels the

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covenantor to convey to him the legal title, also. Atkinson on Titles, p. 33 and following. 2 Story on Equity, p. 23 and following.

*F. M. Haight*, for same.

The advance of money by Brant to Ford, and the conveyance by Robertson to Brant, and the defeasance executed by Brant, created a mortgage. The principle is undoubted, that wherever the real object of the transaction is security for money to be returned or paid, a mortgage is created, no matter what may be the form of the papers, or with what words the parties may seek to disguise the transaction.

Courts of equity lean against construing instruments to be conditional sales, and the burden of proof is on the grantors to show that a conveyance is so. If it be doubtful, it is held to be a mortgage. *Flagg v. Mann*, 2 Sumner, 486. *Desloge & Rozier v. Ranger*, 1 Mo. Rep. 327. *Crane v. Bonnell*, 1 Green, Ch. R. 264. *Robertson v. Campbell*, 2 Call. 421. 3 Green Ch. R. 370. *King v. Newman*, 2 Munf. 4. *French v. Lyon*, 2 Root, 69.

In the following cases it has been held that where there is an absolute conveyance and an agreement to re-convey, on payment of the purchase money, the transaction was a mortgage. 17 Ohio, 256. 6 Barr (Pa.) 390. 18 Pick. 299. 1 Met. 117-119. 6 Dana, 473. 15 John. 205.

An absolute deed, with a separate defeasance, constitutes a mortgage. 7 Watts and Serg. 335. 10 Ohio, 433.

And this though the parties had no intention of making a mortgage. *Cowell v. Woods*, 3 Watts, 188. 4 Pick. 349. 2 Mass. 493.

Cites further. *Johnston v. Gray*, 16 Serg. and Rawle, 361. 5 Binney, 499. 3 J. J. Marsh. 353. 3 Blackf. 51. *Hammond v. Hopkins*, 3 Yerg. 525. 4 Munf. 140. *Wells v. Brockway*, 1 Paige C. R. 617. 19 Conn. 29.

It is said there are certain indications or ear marks which distinguish a conditional sale from a mortgage, and in this case, the indicia of a mortgage are wanting.



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The cases cited show that there are no necessary or indispensable circumstances by which the nature of the transaction is invariably held to be one or the other. It is a question of intention and each case must depend on its own peculiar circumstances. In this case, the circumstances furnish evidence of the intention to create a mortgage.

In any view of the case, Robertson had an interest in the land which was saleable under execution. He was in possession under a lease and holding a contract for the purchase. His possession was as tenant and also as owner. Cites, 3 John. Ch. Rep. 312. 6 do. 398.

*Todd & Krum*, for defendant in error.

The case is not properly saved for review in this court.

The transaction between the parties, in respect to the premises in question, was a conditional sale, and the plaintiff having tendered the amount of money specified in the covenant, is entitled to a decree for a specific performance.

This case comes clearly within the principle stated in 2 Edwards' Ch. Rep. 138 ; because,

1. The covenant itself contains nothing to make the transaction a mortgage.
2. The price was fixed.
3. No disparity was shown between the money advanced by Brant and the value of the premises.
4. The relation of debtor and creditor between Robertson and Brant was not shown.
5. Brown's acts, such as making leases, receiving rents, &c., show that he regarded the transaction as a *sale* and not a mortgage.

Cite further to same point. 7 Cranch, 218. 14 Pick. 467. 2 Yerg. 6. 1 Pow. on Mort. 137. 7 Mo. 327. 1 Wash. Rep. 125.

The sale under the execution, and the sheriff's deed to Brant, did not defeat Robertson's right to pay or tender the money and claim a deed from Brant under his covenant. His interest under the covenant was not saleable on

execution, either at common law or by the statute of this state.

It is a well settled principle of the common law that no property, but that to which the debtor has a *legal title*, is liable to be taken on execution. 8 East. 467. 6 Barb. Rep. 116. 1 John. Ch. Rep. 52. 17 J. R. 354. 5 Bos. and Pul. 461. 1 Vesey Jr. 431. 13 Pet. 294, 301.

It is equally well settled that a *chose in action* cannot be levied on under a writ of *fi. fa.*, and Robertson's interest under the agreement is a pure *chose in action*. 13 Pet. 294.

The 5th subdivision of section 14 of the act to regulate executions, p. 478, Rev. Stat. 1845, does not comprehend within its provisions such a right or interest as Robertson had, under the covenant in question, at the time of the execution sale, because,

1. Brant was not seized of the premises in question *to the use* of Robertson, for the latter had not as yet paid anything.
2. Robertson was in possession under a lease from Brant, and not under the covenant.

Statutes containing similar provisions have been adopted in several of the states, and the courts have given them judicial construction. 13 Peters, 294. 5 S. and M. 130. 7 S. and M. 111, 630, 651. 1 Verm. 411. 1 Conn. 226. Sug. on Ven. 337.

The statute of Missouri does not change the common law in respect to the sale of a *chose in action* under a *fi. fa.*, and Robertson's interest under the covenant was a mere *chose in action*. Our statute was designed to subject to sale on execution, the real estate or hereditaments of a person having the entire interest therein, but which was nominally vested in another. Brant was not seized of the premises in question to the use of, or in trust for Robertson, at the time of the execution sale. 4 J. R. 96. 17 J. R. 351-354, and cases there cited.

We concede that if Brant had instituted ejectment after his

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purchase under the execution, but before tender of the money under the covenant, he could have ejected Robertson and thus acquired his possession. The latter, in an ejectment suit, would be estopped from denying Brant's right to the possession of the premises under his purchase at sheriff's sale; but such purchase did not have the effect to cancel Brown's covenant. The case of *Jackson v. Scott*, 18 J. R. 94, illustrates this position fully.

The same facts reported in 7 J. R. 356, were reviewed in *Bogart v. Perry*, 1 John. Ch. Rep. 52, where further illustrations were given by the Chancellor, which show, that upon the facts in this case, Robertson's right was but a mere *chose in action* and not subject to execution. Of course, his right under the covenant is spoken of, and not his possessory right under the lease from Brant.

The case of *Jackson v. Parker*, 9 Cow. 73, relied on by plaintiff in error, was a suit in *ejectment*, and while the law of that case is not controverted, it is denied that it is applicable to this. On the contrary, the court in that case lays down the very rule here contended for: for in speaking of the *lien* of the judgment, and of the defendant's interest, the court says: "*there must be either an interest known and recognized at law, or an equitable title within the purview of the statute of uses.*"

If this court holds that, upon the facts in this case, the relation of *mortgagor* and *mortgagee* existed between the parties, and that Robertson is entitled to redeem, then it is submitted that he is entitled to have credit for the rents paid Brant. This court may correct the judgment of the Circuit Court in this particular, and render such a decree as the Circuit Court should have rendered.

The appellant should not have been allowed the amount paid by him. Such payments were not necessary to protect his rights, and he occupies the position of a volunteer. At all events, whatever he did enures to the benefit of Robertson. 4

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Kent, 66, (3d ed.) Tuck. notes, 157, 426. 2 Story Eq. 285.  
2 John. Ch. R. 30.

GAMBLE, Judge, delivered the opinion of the court.

Robertson was the owner of a lot in St. Louis, which was subject to an incumbrance, to secure to John Ford the payment of notes which Robertson had given to Ford for the purchase money of the lot, Robertson having bought the lot from Ford. The purchase money having become payable and Robertson having failed to pay, Ford caused the property to be advertised for sale under his deed of trust. On the 8th February, 1848, Robertson, being unable to pay the money, made an arrangement with the defendant Brant for the payment of the debt to Ford. As the transaction between Robertson and Brant is in a great measure to bear the character it receives from the papers executed by the parties, it is proper to state their contents fully. Robertson, on the day mentioned, executed a deed, by which he conveyed to Brant the property in question, using the words "grant, bargain, and sell," with the effect which they have under our statute. At the conclusion of the deed, is this sentence: "It is hereby witnessed, that there is an incumbrance already on said real estate in favor of John Ford, created by deed of trust, dated April 1, 1847, recorded in Book I, No. 4, page 59, and following." On the same day with this conveyance, and evidently as a part of the arrangement, Brant executed a covenant to Robertson, in these words:

"Whereas, Thomas B. Robertson did, by deed, bearing date April 1, 1847, recorded in Book I, No. 4, p. 59, convey to the trustees of John Ford, a lot of ground or parcel of land, in the city of St. Louis, fronting on Fifth street, fifty-seven feet, and running back westwardly one hundred and thirty-feet, on which is situated the "Laclede Saloon," and whereas, at the same time, said Robertson executed to said John Ford his promissory notes for the principal sum of six thousand dollars and interest, which were secured to be paid by said trust deed:

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and whereas, one of the principal notes, for the sum of two thousand dollars, became due on the 10th day of January, 1848, and was unpaid, by reason whereof the whole of said principal money and interest, up to the time of foreclosing said deed of trust, became due and demandable by said John Ford; and whereas, by virtue of said deed of trust, said John Ford had caused said lot of ground and premises to be advertised for sale on the 7th day of February, 1848; and whereas, at the request of said Thomas B. Robertson, Joshua B. Brant, of St. Louis, in the State of Missouri, did agree to purchase the said premises from the said Robertson, and to take to himself an assignment of said notes, secured by said deed of trust; and therefore, to give the said Robertson an opportunity of redeeming the same, at any time within three years from the date hereof. Now, therefore, this agreement witnesseth, that the said Joshua B. Brant, in consideration of the premises, doth covenant with said Thomas B. Robertson, as follows: If said Thomas B. Robertson shall, within three years from the date hereof, pay to the said Joshua B. Brant the sum of six thousand two hundred and four 45-100 dollars, then and in that case, said Joshua B. Brant will convey to him, said Robertson, the said lot of ground and parcel of land, by a good and sufficient deed. But if said Thomas B. Robertson should fail to pay said sum of money to said Joshua B. Brant, within said term of three years herefrom, then this covenant is to be absolutely void at law and in equity.

“It is further agreed, that this covenant is not assignable, either in law or in equity, and that it is only binding on J. B. Brant, in favor of said Robertson and his right heirs, and not enforceable against said Brant, at the suit of any creditors of said Thomas B. Robertson, or any person other than said Robertson, claiming the benefits of the same. In other words, it is a covenant binding on the said Joshua B. Brant, in favor of the said *Thomas B. Robertson* and his right heirs, only, and not capable of being made the foundation of any action whatever, at law or equity, in favor of any third person.

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In witness whereof, said parties have hereto set their hands and affixed their seals, the 8th day of February, 1848, at St. Louis, Missouri.

J. B. BRANT, [SEAL.]  
THOS. B. ROBERTSON, [SEAL.]”

On the same 8th of February, Brant made a lease to Robertson for the premises, for the term of three years, at a rent of \$660 per annum. The property was afterwards, during the lease and before Robertson had tendered any money to Brant to redeem the property, sold under judgment and execution against Robertson, and Brant became the purchaser. After the purchase at sheriff's sale, the parties seem to have regarded the first lease as terminated, and on the 22d December, 1848, Brant executed to Robertson a new lease for two years, at a rent of \$900, the rent payable monthly. Within the three years from the making of Brant's covenant, and after the sheriff's sale, Robertson tendered to Brant the amount of money, upon the payment of which the lot was to be conveyed to Robertson, and Brant refused to accept the payment or make a deed to Robertson.

This suit is brought by Robertson, to enforce the specific execution of Brant's covenant. Brant, in his answer, alleges that the transaction between him and Robertson was a loan of money by him, and a mortgage to him by Robertson, to secure the money lent, and that the defeasance was, at the request of Robertson, executed upon a separate paper. He then insists upon his purchase of Robertson's interest or equity of redemption at sheriff's sale, as a bar to the relief sought.

On the part of Robertson, it is insisted that the transaction was a conditional sale, and that the right to redeem, which Robertson had under Brant's covenant to reconvey, was not vendible under execution, and that consequently Brant, by his purchase at sheriff's sale, did not change the relations of the parties, or divest Robertson of his right to purchase the property, upon the terms stated in the covenant.

The court has been greatly embarrassed in this case, in



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determining upon what facts the judgment of the court below is to be considered as based. The finding of the facts by the court is more meagre than it should have been, when it is apparent that the principal evidence in the case was documentary, and that the parties admitted the facts not shown by the exhibits. To give an instance of this: it appears upon the transcript, by an agreement of counsel, that at the time of executing the different instruments, dated on the 8th of February, 1848, Robertson gave no note or obligation to Brant, for the payment of the money advanced by him, as mentioned in the covenant; yet, the finding of the court does not determine this question of fact, one way or the other. Again, the parties agreed that the exhibits filed by them, respectively, should be read in evidence, without proof of execution, and a bill of exceptions contained in the transcript shows that two leases made by Brant to Robertson, one on the 8th of February, and the other after his purchase at the sheriff's sale of Robertson's interest, were in evidence; and yet, the finding of the court mentions only one lease, and, by its language, conveys the impression that Robertson continued in possession under that lease until June, 1850. Again, the covenant of Brant, which is also executed by Robertson and is the very foundation of this action, and which is sufficiently found by the court, as an instrument ascertaining the rights of the plaintiff, recites, that "Brant, at the request of Robertson, agreed to purchase the premises from Robertson, and to take to himself an assignment of the notes, secured by the deed of trust to Ford." Yet, the court, in finding the consideration of the deed from Robertson to Brant, finds it to be, "the payment and satisfaction by Brant of a debt of that amount, due from Robertson to one John Ford, the payment of which had been secured by a deed of trust," &c. It will be seen, at a glance, that it is a fact of the first importance, in determining the real nature of this transaction and the intention of the parties, whether Brant, under the agreement, held the notes given by Robertson to Ford, by an assignment of them to him by Ford, or whether he simply paid

the money to Ford, as an extinguishment of Robertson's indebtedness.

1. It has been held by this court, that in a case where the trial below has been by the court, and the facts have been found by the court, the errors to be examined here, are confined to the decision of the court upon the facts found, unless a review has been sought in the court below, upon a specific question of law or fact, and a case made as provided in the 3d sec. of article 15 of the Code of Practice.

It has also been held, that where the court has determined the issues, by a general finding in favor of either party, and no exception is taken to that mode of determining the facts, the judgment will not be disturbed in this court, either because of the failure to find the facts, or because of any legal opinions expressed by the court in the old mode of raising questions of law by instructions.

The present is a case in which the intention of the parties, and the nature of the transaction between them, must be determined, not merely by the words of the instruments they executed, but by all the circumstances attending the transaction. It is not now a question requiring any elaborate review of authorities, that a deed absolute upon its own face may be shown to be a mortgage, and it is a principle as certainly and clearly established, that where a defeasance, or other instrument of writing, is executed at the same time with the absolute deed, by which the grantor in the deed has rights secured to him, in relation to the property, courts will look into the whole transaction and all the circumstances, to ascertain the intention of the parties. The authorities abundantly prove, that upon the question, whether the instruments thus executed constitute a conditional sale or a mortgage, the preceding relations of the parties, the value of the property, and all circumstances attending the agreement, are to be taken into consideration.

In the present case, the agreement between Brant and Robertson, executed at the same time with the deed to Brant, in all probability was made after the money had been received by

Ford; for the instrument, although dated on the 8th of February, recites the fact that the property was advertised for sale on the 7th of that month. Now, if Brant, at the time of the execution of these different instruments, was actually the holder of the notes of Robertson, by assignment from Ford, he was then, in form and substance, a creditor of Robertson; and one fact which is considered by courts, as tending to show the nature of the transaction, and to give it the character of a mortgage, would be thus made apparent. On the other hand, the finding of the court is, "that the consideration of the deed from Robertson to Brant, was the payment and satisfaction by Brant, of a debt of that amount due from Robertson to one John Ford." Whether this finding means, strictly, the extinguishment of the notes, so that they no longer were evidence of indebtedness by Robertson to any person, or whether, when taken in connexion with the recital in the agreement, it means, that the debt as a debt due to Ford was satisfied by Brant, by his paying the amount to Ford and taking an assignment of the notes, is not entirely clear.

Again, the real question is, whether Robertson was debtor to Brant when the conveyance was made, and this might be the fact, although the notes of Robertson to Ford were extinguished—for if, in reality, the parties agreed expressly that the money paid by Brant to Ford should stand and be regarded as money paid and expended for Robertson, which Robertson was to repay and to be personally bound to repay, then he would be the debtor of Brant, notwithstanding the notes were satisfied and discharged. Now, in this condition of uncertainty, as to the real meaning of the finding of the court, it may be, that great injustice would be done to the parties, if we assume, either that Brant was the holder of the notes given by Robertson to Ford, by an assignment from Ford, or that the finding of the court absolutely imports that the notes and debt were extinguished, and that Robertson was not the debtor of Brant.

In the argument of this case great stress has been placed on the recitals in the agreement, and upon the language used

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by the court in its finding. Yet, the matter of fact, whether the notes to Ford were extinguished and not assigned to Brant, or whether Robertson agreed to be personally bound to repay Brant, is susceptible of easy proof, and of very concise and clear statement. In the working of the new system of practice, it would be but perpetrating injustice under the forms of law, if we should allow a case like the present to be determined finally, upon a finding which leaves one of the main points in dispute not clearly ascertained. With entire consistency with the decisions heretofore made, we can regard this finding of the court as a finding of the facts, upon its own face incomplete, and therefore, requiring that the court below shall hear it anew. The recital being, "that Brant had agreed to take to himself an assignment of the notes," is not conclusive that they were assigned to him. The finding "that the consideration of the deed to Brant was the payment and satisfaction of the debt to Ford," is not conclusive that the notes were not assigned to Brant, nor is it conclusive that Robertson was not bound to pay Brant for the amount, as advanced at his request. It is desired that the fact be precisely found and stated.

It might be sufficient for the present disposition of this case, that it be sent back for a farther hearing, but the principal points in the cause have been elaborately and ably argued, and it may be useful, as well to the parties as to the Circuit Court, that our views upon the points discussed be briefly stated.

When the various decisions, involving the difference between mortgages and conditional sales, are examined, it will appear, that the person who, under the pressure of immediate and unavoidable necessity, has apparently parted with his property to the man of money, is generally the party who claims for the transaction the character of a mortgage; while the opposite party, who has, in his own abundance and the necessities of his neighbor, the means of driving a good bargain, claims that the transaction was a conditional sale, and that only by a strict literal fulfilment of the conditions, can his bargain be wrested

from him. In the present case, as the interest of a mortgage can be sold under execution by our law, and as Brant claims to have thus purchased Robertson's interest, the parties change places, and Brant insists that the transaction was a mortgage, while Robertson maintains that it was a conditional sale, and that under such sale Brant acquired nothing, because he had no interest vendible upon execution. This question in the case is to be determined upon the facts, as they existed on the 8th of February, 1848, without regard to what has subsequently occurred. If it was then a sale upon condition, it was so throughout the whole time the parties were acting in relation to it, and if it was then a mortgage, it so continued until the equity of Robertson was extinguished, if it has been extinguished at all.

2. In determining whether the transaction was a conditional sale or mortgage, the first fact to be ascertained is, whether the relation of debtor and creditor existed previous to, or was created at, the time of the conveyance. It may be taken as universally true in law, that no conveyance can be a mortgage, unless it is made for the purpose of securing the payment of a debt, or the performance of a duty, either existing at the time the conveyance is made, or to be created, or to arise in the future. If the payment of money is the object of the security or conveyance, then there must exist a duty to pay the money. Not that it is necessary that the duty should be evidenced by a bond, or covenant, or note, or other security. A mortgage may as well be given, to secure the payment of a loan, where the whole evidence of the debt rests in the memory of witnesses, as if it could be shown by the most solemn instrument. So, an absolute deed may be shown to be a mortgage, by showing that it was made as a security for the debt or the performance of the duty, whatever may be the evidence of the debt or duty. Mr. Justice Story, in *Flagg v. Mann and others*, 2 Sumner, 533, says: "It has been said, that the true test whether the conveyance in this case was a mortgage or not, is to ascertain whether it was a security for the payment of any money or not. I agree to that; and, indeed, in

all cases, the true test, whether a mortgage or not, is, to ascertain whether the conveyance is a security for the performance or non-performance of any act or thing. If the transaction resolve itself into a security, whatever may be its form, it is, in equity, a mortgage. If it be not a security, then it may be a conditional or an absolute sale." The case, which the learned Judge was considering, was one in which Walker and Fisher, the grantees, paid for Richardson (the grantor in the deed,) a debt, due from Richardson to Bennett, which was an incumbrance on the premises conveyed to Walker and Fisher. It was the question before the court, whether the conveyance was a mortgage. The Judge proceeds: "It is said, that here there was no loan made, or intended to be made, by Walker and Fisher to Richardson; and that they refused to make any loan. There is no magic in words. It is true that they refused to make a loan to him in money. But they did not refuse to pay for him the amount due to Bennett, and to take the premises as their security for reimbursement within five years.

"It is said, that there is no covenant on the part of Richardson to repay the money, which should be paid by Walker and Fisher, to discharge the incumbrances on the premises. But that is by no means necessary, in order to constitute a mortgage, or make the grantor liable for the money. The absence of such a covenant may, in some cases, where the transaction assumes the form of a conditional sale, be important, to ascertain whether the transaction be a mortgage or not; but, of itself it is not decisive. The true question is, whether there is a debt still subsisting between the parties, capable of being enforced in any way, *in rem*, or *in personem*." The learned Judge, after referring to some authorities, proceeds: "Now, it seems to me clear, upon admitted principles of law, that, on the payment by Walker and Fisher to Bennett, of the money due from Richardson to Bennett, Richardson became the debtor of Walker and Fisher for that amount, as it was paid at his request and for his benefit." The language of the Judge, in this case, is quoted, not because there is any novelty in the



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principles he declares, but because there is a clear enunciation of several principles in a short compass. In that case, the decision of the court was, that the conveyance from Richardson to Walker and Fisher was a mortgage. The Supreme Court of Massachusetts deciding upon the same conveyance, in *Flagg v. Mann*, 14 Pick. 467, held it a conditional sale and not a mortgage.

3. There cannot be stated any rules, by which all transactions like the present can be tested, and their true character determined; and, probably it is safer, that in contests which arise between wealth on the one side and necessity on the other, courts should be left free to decide cases according to their own circumstances. In all cases the real meaning and intention of the parties determine the character of the transaction. Every man is as much at liberty to make a conditional sale of his property, as a mortgage of it, and courts cannot do violence to the real contract of the parties, when ascertained. Where there is no allegation of fraud, or of other facts, upon which equity grants relief against the apparent obligation of contracts: where the intention of the parties is doubtful, and the court is to determine whether the transaction is a mortgage or conditional sale, it will be held a mortgage, as that construction is the more just and equitable. In order to ascertain the intention of the parties, the court will look not only to the deeds and writings, but to all the circumstances of the contract. *Prince v. Bearden*, 1 A. K. Marsh. 170. *Oldham v. Halley*, 2 J. J. Marsh. 114. *King v. Newman*, 2 Munf. 40. In *Desloge & Rozier v. Ranger*, 7 Mo. R. 329, this court says: "Courts of equity have never denied to parties the power of making contracts for conditional sales, and if the form of the instrument, together with the extrinsic circumstances attending the contract, are conclusive of the intention of the parties, it is not their province to interfere. When the form of the instrument is not conclusive, either way, resort must be had to the circumstances attending the transaction, and if, upon a full view of the whole matter, doubts may be

reasonably entertained as to the real intent of the parties, courts of equity have inclined to regard the transaction as a mortgage." In this last case, certain distinguishing features of a conditional sale are mentioned, which are taken from the opinion of the court in *Bennett v. Holt*, 2 Yerg. 6. But the particulars mentioned as belonging to such a transaction are, at last, but facts in evidence in the case, which are entitled to great weight in determining what was the intention of the parties.

The great question in this case, and the one upon which we wish a clear finding of the court, is, whether at the time of the conveyance to Brant, and of his covenant to Robertson, there was a subsisting debt from Robertson to Brant. This will be determined by finding whether Brant held the notes of Robertson by assignment from Ford; and if he did not, whether he advanced the money to Ford in payment of the notes, upon any express undertaking of Robertson, to repay the money, otherwise than by forfeiting his interest in the property. If the fact be found, that Robertson at and after the execution of the instruments, was not the debtor of Brant, either by reason of Brant's being the holder of his notes by assignment, or by reason of his personal undertaking to repay the money paid to Ford, then the transaction, as it is now presented upon the record in its other features, would appear to be a conditional sale; and these features remaining, nothing can change its character, but establishing the fact of personal indebtedness from Robertson to Brant, in one or the other form before indicated.

4. Upon the second question, whether if the transaction be a conditional sale, Robertson had any interest in the property vendible upon execution, the views of the court will be briefly expressed.

It is conceded, that there was no interest which could be recognized as an estate at law, except that he was in possession. But, it is contended, that a person in possession of land, under an agreement to purchase, has such an interest, as, under our

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statute, may be sold on execution. If this be admitted, it is not perceived that, in the present case, it would be of much value, in support of the title acquired by Brant under the sheriff's sale. The agreement or covenant which is set up by Robertson, and under which he now claims, makes no mention whatever of the possession, or how the property is to be occupied; and, therefore, the possession is not to be considered as a possession under it, if there is a contract between the parties which entirely covers the subject of possession. Robertson's was under a lease from Brant. While possession may be evidence of an estate of any dignity or quality, yet, when the instrument which confers the right to the possession upon the tenant, is produced, the possession is to be regarded as held under that instrument, and is, in itself, no evidence of any other or different title in him. When Brant, then, purchased at sheriff's sale, he purchased the right which Robertson had to the possession of the property, which right arose out of, and was regulated by the lease which he himself had made to Robertson. That instrument, and that alone, conferred the right to the possession upon Robertson, and to it must be referred the actual possession as held under it, and so the possession is not to be connected in this case with the covenant to convey, as made by Brant. If all weight be given to the authorities cited upon this point, which can be reasonably asked for them, they do not embrace a case like the present.

But, it is next insisted, that the covenant of Brant, by itself, created an interest in Robertson, which was liable to sale on execution. The statute subjects to such sale "all real estate, whereof the defendant, or any person for his use, was seized in law or equity, on the day of the rendition of the judgment, order, or decree, whereon execution issued, or at any time thereafter." *Revised Code*, 478. The 66th section of the act, Rev. Code, 488, directs that the term "real estate," as used in the act, shall be construed to include "all estate and interest in lands, tenements and hereditaments."

The question is presented, whether, if Brant be the undisputed owner in fee of the premises, and has made the covenant in favor of Robertson, which is set out in this case, Robertson by that instrument has any interest in the property before he has elected to make the purchase.

In considering this question, no influence is to be felt from any doubt, whether the transaction, as exhibited upon the whole papers, was not a mortgage. The two views must not be blended. If it was a mortgage, then, under previous decisions of this court, Robertson had an interest that might be sold. But the question is, whether, if Robertson was not a debtor of Brant, and had not paid any thing for this right to redeem, or rather to repurchase, and had not yet determined to repurchase, or offered to pay any money toward a repurchase, and when it could only be regarded as a privilege that he should purchase or not, at his election, he could be regarded as the owner of any interest in the property. It is true, as asserted in *Atkinson*, on Titles, 33d, that "it is a general principle of equity, that what is agreed to be done for valuable consideration, shall be considered as done, and, therefore, after a contract has been entered into for the sale of land, the vendor becomes a trustee of the land for the purchaser, and the purchaser a trustee of the money for the vendor." But this is for the reason that there is an actual mutual agreement to do the two acts, conveying the land, and paying the money. The case of *Townley v. Bidwell*, 14 Ver. 590, is one which appears to establish the reverse of the position for which it was cited. A testator executed a lease to Townley for thirty-three years, with a proviso, that if Townley should desire to purchase the premises in six years, he should pay to the testator, or his heirs or assigns, £600 for the purchase, on having a good title. The testator died within the six years, and within that period, Townley declared his option to purchase. The question in the case was, as to the rents before the option, and when the real was converted into personal estate. The Lord Chancellor declared: "The court must proceed upon a principle applicable to all cases.

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That principle is, that when the condition is performed, the agreement becomes absolute, and there can be no distinction between an agreement so become absolute, and one absolute in its origin. When, therefore, the tenant asserted his right under the option, from that moment that portion of the real estate was to be considered personal." Until the option was declared, the property, as real estate, was in the heir or devisee; when it was declared, equity would regard the right of the real estate, as in the persons entitled to the personalty. This case appears strangely to sustain the position, that until the election was made by Robertson and the money tendered, there was no interest in the real estate vested in him.

Without reviewing the decisions from other states, cited in the briefs of counsel, it is probably sufficient to declare the view entertained of the meaning of our statute, upon the question now under consideration. When parties have bound themselves by agreement to convey land and to pay for it, equity recognizes an interest in the land as already in the purchaser, and the case is the stronger when the purchaser has actually paid in whole or in part; and in either case, the interest of the purchaser may be sold on execution, upon the principle that the vendor is to be regarded as seized in equity to the use of the purchaser. But if no money has been paid, and if the person who may become the purchaser is not actually under any obligation to pay, then there is no seizin in the seller, even in equity, to the purchaser's use, and there is no interest in the land in him, which is liable to sale on execution.

Upon the imperfection in the finding, the judgment will be reversed and the cause remanded.

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Smith v. Steinkamper.

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## SMITH, Appellant, vs. STEINKAMPER, Respondent.

1. A. sold B. a horse, and received in exchange a yoke of oxen, and was to receive ten dollars besides. A. warranted the horse to be sound, and agreed to take him back if he proved unsound. The horse proving unsound, B. offered to return him and demanded back his oxen.

*Held.*—In an action by A. against B. for the ten dollars, B. may set off and recover the value of the oxen.

*Appeal from the Law Commissioner's Court of St. Louis County.*

The plaintiff sold to the defendant a horse, for the sum of fifty dollars, and received at the time in payment, a yoke of oxen valued at forty dollars, the remaining ten dollars to be paid at a future time. At the time the bargain was made, the plaintiff warranted the horse to be sound and able to work well, and it was especially agreed, that if the horse, upon trial, should not prove to be as represented, the contract was to be rescinded, and the plaintiff should take back the horse and return the oxen to the defendant.

The horse, upon trial, was found to be crippled and wholly unable to work, and the defendant immediately demanded his oxen, and offered to give up the horse. The plaintiff refused to restore the oxen, and brought suit before a justice to recover the ten dollars, the difference between the horse and the oxen, which he was to have received.

The defendant set off the value of the oxen, forty dollars, and fifteen dollars for the value of their services, while in the possession of the plaintiff, before suit was brought. The jury, on the trial before the justice, rendered a verdict in favor of the defendant, for forty dollars, the value of the oxen. The plaintiff appealed to the Law Commissioner's Court, where, upon a trial anew, the judgment of the justice was affirmed. No motion was made before the justice or in the Law Commissioner's Court to strike out the set off.

The cause is brought into this court by the plaintiff, to reverse the judgment of the court below.

C. C. Simmons, for respondent.



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The set off in this case was properly allowed. There is no attempt made here to set off unliquidated damages, or in fact, damages of any kind. Assuming the facts to be, (as it was contended they were proven,) that the oxen were received by the plaintiff, in payment for a horse sold to the defendant by him, that their value was forty dollars, and that it was an essential ingredient of the contract, that the oxen should be returned if the horse proved to be unsound; that the horse turned out to be, upon immediate trial, unsound and valueless; that as soon as this fact was ascertained, the defendant demanded to have the oxen returned to him and offered to give back the horse; then the defendant holds, that he not only had his cause of action in *indebitatus assumpsit*, to recover of the plaintiff the value of the oxen, but might, when sued, as in this case, for the remainder of the price which he had agreed to pay for the horse, treat the value of the oxen as an indebtedness due him from the plaintiff, growing out of the same transaction, and set it off as a defence against said action, and recover the same.

The instructions given for the defendant were both legal and proper, as the case stood.

RYLAND, Judge, delivered the opinion of the court.

This was an action commenced before a justice of the peace, by Smith against Steinkamper, for the sum of ten dollars, upon the following case. Smith and Steinkamper made a trade concerning a horse and a yoke of oxen. Smith let Steinkamper have his horse for the steers and for ten dollars—Smith warranted his horse to be sound and to work well; if not, he would take him back and give up the steers.

Steinkamper delivered the steers and took the horse; the ten dollars were not paid down, but were to be paid by Steinkamper. Shortly after the trade, the horse proved to be unsound and not to work well, and died in a month or so. As soon as Steinkamper found the horse to be unsound and not to work well, he offered to return him, and demanded his steers of Smith. Smith refused to give up the steers, and sued Stein-

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kamper for the ten dollars. Steinkamper set off the price of the steers, and the value of their labor, between the time of the trade and the suit, amounting to fifty-five dollars. The horse was valued at the time of the trade at fifty dollars, and the steers at forty dollars.

The jury found for the defendant the sum of forty dollars. The plaintiff appealed to the Commissioner's Court, where judgment was again rendered against plaintiff for forty dollars, in favor of defendant, and he appealed to this court.

The record shows, that the plaintiff asked the court to instruct the jury, "that in the present case the defendant cannot set off the value of the steers to the plaintiff's claim, but he must resort to his cross action," and "that the said value could only be pleaded as failure of consideration," both of which the court refused, and the plaintiff excepted.

The instructions given by the court embraced the law of the case. The second instruction informs the jury that if they believe that defendant paid in part for said horse a yoke of oxen, and that the agreement between the parties was, that the oxen should be returned to the defendant, and the horse given up to the plaintiff, if found to be unsound and unable to work well, and that said horse was unsound and unable to work well, when sold, and that the defendant, upon ascertaining the fact, offered to return said horse, and demanded his oxen, the defendant may, in this suit, set off the value of said oxen against the demand in this cause. "

The court also instructed the jury, that "if the horse was warranted sound, and proved unsound, and defendant offered to return him, and plaintiff refused to take him back, then, the plaintiff could not recover his ten dollars," &c.

We consider that the case was put very fairly before the jury by the court; that the instructions given were correct, and were warranted by the evidence; and the one refused was properly refused. We are satisfied with the proceedings of the court below. The evidence showed plainly a contract to take back the horse, if he was unsound and would not work well;

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also showed that he was unsound and unable to work well. Now, the whole defence consists in objecting to the defendant's offset, and to the allowance of such offset, instead of driving the defendant to his cross action. We think one suit might well have sufficed to settle this controversy, and that two verdicts might have satisfied this plaintiff.

The judgment is, therefore, affirmed, the other Judges concurring herein.

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STEAMBOAT BEARDSTOWN, Respondent, vs. GOODRICH & OSBORNE, Appellants.

1. Under the 35th section of the act concerning boats and vessels, (R. S. 1845,) one of several part owners of a steamboat may sue in the name of the boat.

*Appeal from St. Louis Circuit Court.*

*P. C. Morehead*, for appellants.

*H. N. Hart*, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The only question in this case, calling for the determination of this court, is one arising on the construction of the statute concerning boats and vessels.

The defendants below, appellants here, contend, that one part owner of a boat cannot sue in the name of the boat, but that all the owners must unite.

The 35th section of the above statute declares, that "any boat or vessel may institute suit in the name of such boat or vessel, through the owner, master, agent, or consignee thereof, for all freights due to such boat," &c.

The suit is in the name of the boat or vessel. An agent, a consignee, a master, or owner may sue. Now, the appellants contend, that all the owners must unite to sue. Why? The suit is not in their name. The plaintiff is the boat. Why cannot an owner put the suit in motion as well as an agent or consignee? There is nothing to prevent his doing so in the

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statute. We are of the opinion, that this point is clearly against the appellants.

This is the main question in the case, and the instructions refused bear on this, and the one given to the jury is in relation to this.

The other question about the garnishment, was properly decided below.

Upon the whole record, there is nothing requiring the interference of this court. The judgment of the court below is affirmed, the other judges concurring.

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EARLY, Plaintiff in Error, *vs.* FLEMING, Defendant in Error.

1. To enable a person to justify, under the act concerning "Inclosures," (R. S. 1845,) for killing his neighbor's stock, he must bring himself exactly within the protection of the statute.
- . No formality is necessary in the statement of the cause of action before justices of the peace.

*Error to St. Louis Law Commissioner's Court.*

*A. J. P. & P. B. Garesche*, for plaintiff in error.

This action was brought under the "Inclosure" act, R. S. 1845, p. 575. Section 4 of that act clearly permits a person to justify the killing of another's animals that are trespassing upon his land, upon proving that it was inclosed within a lawful and sufficient fence, and *in such case only*. The instruction of the court below was, therefore, erroneous.

*Knox & Kellogg*, for defendant in error.

The testimony introduced by the plaintiff did not sustain or tend to sustain the claim as filed.

As the suit was not brought under the act regulating Inclosures, Rev. Stat. of 1845, p. 575, the said act is not, in any wise, applicable.

If the court shall be of the opinion, that the plaintiff can recover the value of the hogs killed, then the defendant has a right to have the loss sustained by him, by reason of the hogs

destroying his crops, &c., allowed, which loss is greater in amount than the plaintiff's claim.

Although the commissioner may have erred in giving instructions, yet, as the record shows the verdict to have been rendered for the right party, this court will not disturb the verdict.

GAMBLE, Judge, delivered the opinion of the court.

Early sued Fleming before a justice of the peace, and stated his case to be for three hogs, but whether sold to the defendant, or killed, or taken away by the defendant, is not mentioned in the statement. The justice's docket shows the nature of the demand to be for stock of plaintiff shot by defendant.

The parties having had a trial before the justice, in which the plaintiff succeeded, the defendant appealed to the Law Commissioner. Before the Law Commissioner, a trial was had, which resulted in a verdict and judgment for defendant, from which the plaintiff appealed to this court.

It appeared, before the commissioner, that the plaintiff's hogs were in the defendant's inclosure, which was on the Maramec river, and that the defendant shot them. The defendant's field was not inclosed with a fence, such as is required by statute. The Maramec was very high and partly overflowed the defendant's field.

The commissioner, at the request of the defendant, instructed the jury, that "if they believe, from the evidence, that the defendant's fence, owing to the high water, would not have been able to keep out from his inclosure the plaintiff's pigs, whether said fence had been a legal one or not, they will find for the defendant."

1. It is not attempted in argument to sustain an instruction so entirely erroneous as this. The man who kills his neighbor's stock, must place himself exactly within the protection of the statute that allows such vengeance.

2. For the appellee, it is insisted that the statement or bill of items before the justice, is not sufficient, as it does not purport to be for the killing of hogs. All formality is dis-

pensed with, in the statement of the cause of action before justices of the peace, and here, the parties manifestly understood the nature of the plaintiff's demand.

Let the judgment be reversed, and the cause remanded.

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SEXTON, Respondent, *vs.* MONKS, Appellant.

1. The 13th section of the 7th article of the New Code, requiring either party relying upon a record, deed, or other writing, to file the original, or a copy, with his plea, is only applicable to cases in which the party recites his title in his pleading, as existing by written conveyances; or to a case in which the record, or writing, is recited in the pleading, as confirming or barring a right.)
2. The interest of a mortgagor, or pledgor, of personal property in the hands of the mortgagee, or pledgee, is not subject to sale under execution.

*Appeal from St. Louis Court of Common Pleas.*

Sexton sued Monks under the New Code, alleging, in his petition, that on the 7th of February, 1849, the defendant, without leave, and wrongfully, took the following property of the plaintiff and has not returned the same, viz: "one roan mare of the value of \$75, and one chesnut sorrel mare of the value of \$75, by which plaintiff says he is damaged to the amount of \$200, for which he asks judgment."

The defendant, in his answer, denies that he took the property of the plaintiff, or wrongfully detained the same, or that the plaintiff has sustained any damage by any act of the defendant. The defendant refers to judgments obtained by him before justice Kitzmiller, on the 4th of November, 1848, in his favor against D. F. White. Execution issued thereon on the 13th of November, 1848, under which the mares were sold as White's, to satisfy said execution, and makes said proceedings a part of his answer.

On the trial, February 27th, 1851, the plaintiff offered proof, tending to show, that he was in the possession of the mares sued for, in the fall of 1848, and that he received them from one D. F. White, and having proved said White's signature to the following paper, offered it in evidence:



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“ST. LOUIS, October 25th, 1848.

I have this day received of Patrick Sexton (a colored man,) \$50, and have delivered him a roan horse and a sorrel mare, which he is to use and feed for two months; at the expiration of two months, he may return the two horses and the harness I have loaned him, and I am to pay him back the \$50, or he may keep the horses and pay me \$50 more, at his option.

Given under my hand this day and year written.

D. F. WHITE.”

The defendant objected to the admission of this paper, for the reason that it was not referred to in the petition, and that there was no notice to the defendant of its being filed in the case, as a part of plaintiff's cause of action. The court overruled the objection, allowed it to be read, and defendant excepted.

The plaintiff offered proof, showing that there was a mistake in the writing, in calling one of the animals a horse; that the animals intended were both mares.

The plaintiff then offered a transcript of proceedings before John W. Colvin, a justice of St. Louis township, in a suit in favor of Jno. Smith *vs.* D. F. White, the defendant, and Patrick Sexton, garnishee.

The defendant objected to these papers, because they were not filed with the petition, and no notice given to the defendant of their being filed February 4th, 1851. The court admitted them, and defendant excepted.

The transcript showed, that John Smith commenced suit by attachment against D. F. White, on the 15th day of December, 1848, and that on the same day, Patrick Sexton, the plaintiff, was summoned as garnishee; that on the 3d day of January, 1849, Sexton answered as garnishee, admitting that when he was summoned as garnishee, he had a sorrel and roan mare, belonging to White, in his possession, which he held under the writing dated 25th day of October, 1848, above copied, but that the two months, mentioned in the writing, having elapsed, and White not having demanded the two mares, he considered that he owed White \$50.

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On the 2d of February, 1849, judgment was rendered against Sexton, as garnishee, on his answer, and on the 8th day of February, 1849, execution issued on this judgment against him, which was afterwards entered "satisfied."

The defendant then introduced a transcript from Justice Kitzmiller, a justice in St. Louis township, showing, that on the 4th day of November, 1848, the defendant in this action, J. A. Monks, obtained judgment against D. F. White, for \$100 and costs, and that on the 13th of November, 1848, an execution issued on said judgment, to the constable of St. Louis township, which was received by the constable the same day, and that under this execution, the constable levied on the two mares, as the property of D. F. White, on the 24th of January, 1849, in St. Louis township, and sold them to satisfy said execution, on the 7th day of February, 1849, for \$69.

The court gave the following instructions to the jury.

1. The contract read in evidence, dated October 25th, 1848, passed the title to the property, on the delivery of the same to Sexton. If the jury believe that the property in question belonged to White on the 25th of October, 1848, and that he executed the contract of that date, on payment to him of \$50, and delivered the property to Sexton, and that the property continued in the possession of said Sexton, and was not returned by Sexton to White, and that after the expiration of the two months from the date of the contract and before the actual levy of execution in the suit of Monks against White, said Sexton was summoned as garnishee in an attachment suit against White, and judgment was rendered against him as said garnishee, then the jury will find for the plaintiff.

2. To entitle the plaintiff to recover, in this case, he must prove, to the satisfaction of the jury, that the defendant took the property in question, or that it was taken by the defendant's orders or directions and detained from the plaintiff. If the constable took and retained the property or refused to deliver it to the plaintiff on demand of the plaintiff, and thus acted under the directions of the defendant, the defendant is liable

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for all damages sustained by the plaintiff, from the taking or detention of said property.

• 3. The instrument, dated October 25th, 1848, if signed by White, and if the property named in said instrument was White's at that date, and the same was delivered to Sexton under that instrument, passed the title to the property, and the same became the property of Sexton, and was not liable to an *execution against White subsequently issued*.

To the giving of these instructions defendant excepted.

The following instructions were asked by the defendant and refused by the court, to which refusal the defendant excepted.

1. The jury are instructed, that the execution issued on the judgment before Justice Kitzmiller, in favor of Monks vs. D. F. White, was a lien on all the personal property of said White in the township of St. Louis, from the 13th of November, 1848, and bound such property, so that said White could only pass the title, subject to the lien of said execution.

2. If the jury believe, from the evidence, that the title to the two mares now sued for, was, on the said 13th day of November, 1848, in the said White, and that said mares were in the township of St. Louis, and while they were so in said township, were levied on and sold under said execution before the lien thereon expired, they will find for the defendant.

3. Unless the jury believe, from the evidence, that the plaintiff was the owner of the mares and in possession of them at the time they were taken, and unless they also believe, from the evidence, that the defendant himself took the mares from the possession of the plaintiff, or was present at the taking, or aided or abetted the officer in the taking, they will find for the defendant.

4. The delivery of the two mares sued for to the plaintiff, Sexton, by D. F. White, under the contract given in evidence, did not pass the title to Sexton; the property in said mares remained in White, till the expiration of the two months mentioned in the writing given in evidence. If, therefore, the jury find, from the evidence, that the execution in favor of

Monks against said White, was received by the constable, before the expiration of the said two months, said execution, from the moment of its receipt by said constable, bound the said property, so that it could not afterwards pass from White to Sexton; and if the jury further believe, from the evidence, that the said mares were sold under the said execution in favor of Monks against White, the title to said mares passed by said sale to the purchasers thereof, and the jury will find for the defendant.

5. The delivery of the two mares sued for to the plaintiff, Sexton, by White, under the contract given in evidence, did not pass to Sexton the title to said mares; this remained in White till the expiration of the two months, and then Sexton could only acquire the title to the mares by immediately, on the expiration of the two months, electing to keep them and notifying White of such election, and immediately paying, or offering to pay, at the end of the two months, the other \$50 mentioned in the contract. If he failed to do so immediately on the expiration of the two months, he acquired no title to the mares, and they were liable to be sold under Monk's execution.

*M. L. Gray*, for appellant.

The court erred in permitting the plaintiff to read in evidence the paper dated the 25th of October, 1848, as it was relied on by the plaintiff to prove his title to the property sued for, and was in no way referred to in the petition, as required by the Practice Act, nor was there any notice to the defendant.

The court erred in permitting the plaintiff to read in evidence exhibits filed on the 2d and 27th days of February, 1851, as no notice of the filing was given to the defendant, and as they were filed at the term after the pleadings were made up. One of them was filed on the day of the trial and one a few days before, and the defendant had no notice of them till they were offered in evidence, and had no opportunity to answer them or disprove them. These exhibits were not part of the case made by the plaintiff's petition, to which he should have been confined.

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The court erred in construing the writing dated October 25th, 1848. Said instrument did not pass the title to the plaintiff at the time of the delivery of the property to him under it. It was only a conditional sale, the title remaining in White till the end of the two months, and till the performance by the plaintiff of the further condition required by the instrument. This appears on its face, and by the plaintiff's admission. 2 Gratt. 38. 9 Ala. 24. 17 Vt. 176. 9 N. H. 298. 22 Pick. 535. 3 Metcalf, 9.

The title to the property was in White, at the time that Monk's execution against White came to the hands of the constable, and the lien of said execution bound White's interest from that date, and the subsequent proceedings against White, at the suit of John Smith, could not divest the prior lien of Monk's execution. Rev. Stat. 1845, *Justices Courts*, Art. 7, sec. 5.

*H. N. Hart*, for respondent, contended that the mares were the property of Sexton, from the time of the delivery, and not subject to levy as the property of White; that Sexton was subject to garnishment only, as the debtor of White for fifty dollars, and having been garnished at the suit of Smith, and having paid the balance of fifty dollars on said garnishment, Monks was liable to an action for ordering the mares to be levied on and sold as the property of White.

GAMBLE, Judge, delivered the opinion of the court.

1. There is no warrant in the New Code of Practice for the idea, that a party cannot use in evidence a paper, which has not been filed in the court. The 13th sec. of the 7th Article requires either party relying upon a record, deed, or other writing, to file with his plea an authenticated copy of such record, and the original deed or writing, if in his power. This is only applicable to cases in which the party recites his title in his pleading, as existing by written conveyances, or to a case in which the record is recited in the pleading, as confirming or barring a right. Take the case of a suit upon a note, in which the defendant answers that before the institution of the suit, he

paid the debt ; the defence in such a case is, the fact of payment, and this may be shown by a receipt, or by oral evidence. In such case, a receipt, which proves the fact of payment, may undoubtedly be used in evidence, whether it was filed or not. The party does not "rely on the writing," but on the fact of payment.

The papers given in evidence, in this case, could not be properly objected to, because they had not been filed, or because the plaintiff had not set them out in his petition.

2. The possession of the property, in this case, being in the plaintiff, under the contract with White, the interest of White was not the subject of sale under execution. *King v. Bailey*, 8 Mo. Rep. 332. Whether we regard the possession of the plaintiff, as held under a pledge to him, or a mortgage for the money he had advanced on a conditional sale, the creditor of White could not, under his execution, take that possession from him.

When, in the attachment suit against White, in which the plaintiff was summoned as garnishee, the plaintiff declared his election to keep the horses and pay the remainder of the consideration, and was adjudged to pay, and did pay such consideration, his title to the property was complete.

Let the judgment be affirmed.

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STOOPS, Plaintiff in Error, vs. DEVLIN, Defendant in Error.

1. When a person rents a tenement for one year, and after its expiration, remains in possession, the presumption is, that he has rented it for another year, and not that he is a trespasser.
2. In such case, a tenant holding under him will not be permitted to dispute his title.

*Error to St. Louis Circuit Court.*

This was an action originally instituted before Justice Spalding, for use and occupation of certain premises by George Stoops, rented to Charles Devlin, from the 6th November, 1844, to the 6th of September, 1846, twenty-two



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months, at \$4 per month, making \$88. There are other items in the account, but these were abandoned by the plaintiff, and the sole question tried was, whether rent was due.

The suit was instituted on the 14th of September, 1847, before Justice Spalding, and judgment being in favor of the plaintiff, the defendant appealed to the St. Louis Circuit Court, and judgment being again rendered against him, he moved for a new trial, and the court sustaining the motion, a new trial was granted, and on this second trial in the Circuit Court, judgment was rendered in favor of defendant.

The record shows several motions to have been made by both parties, but these are all waived and the errors assigned are for the proceedings on the last trial, and the refusal of the court to sustain the motion of the plaintiff for a new trial. The evidence in the case shows, that Stoops rented to Devlin the premises at the northwest corner of Third and Almond streets, in St. Louis, at \$4 per month, and that this was a reasonable charge for rent. That Devlin occupied the premises, during the period for which rent was claimed, viz., from November, 1844, to September, 1846; that Stoops, himself, was a tenant of Basse and Youce, under a letting from one Joseph Wherry, the agent of Basse and Youce.

The defendant insists that the property belonged to the heirs of Basse and Youce, of whom, first, J. Wherry, and after his death, Wm. M. Campbell, was the agent. That the property was leased by Wherry to George Stoops in 1842, for a year, as he never would rent it for a longer time, and that Stoops had continued in possession ever since, and that the rent was worth \$9 or \$10 per month, hence \$4 per month for a joint occupation was not too much. Devlin and Stoops occupied the premises conjointly. That at the November term, 1848, two years subsequent to the last day for which rent was sued for, a suit of partition was commenced among the heirs of Basse and Youce, and on the 19th (10th) of June, 1848, the property was sold by the sheriff, and Messrs. Campbell and Wells became the purchasers. Mr. Wells, one of the witnesses, says

that after the purchase, Stoops would not attorn to them, but did not know if he had rented of the heirs of Basse and Youce ; did not know whether he had paid any ground rent, but was confidently of the opinion that he had not. The defendant then read in evidence the record of the suit of partition.

Plaintiff objected to all the testimony given respecting title, but his objection in every instance being overruled, he then offered in evidence an agreement, the signature to which he had proven by Mr. Wells.

The court gave instructions, throwing the whole *onus probandi* of the right of possession upon the plaintiff. A verdict was rendered for the defendant, and plaintiff moved for a new trial, for reasons set forth in the motion, and the court overruling the same, plaintiff excepted and brought the case to this court by writ of error.

*A. P. & P. B. Garesché*, for plaintiff in error.

The defendant having entered into possession under plaintiff, is estopped from denying the plaintiff's title.

If a tenant rent for one year and continue in possession afterwards, his tenancy is from year to year, and his entry being proved to be lawful, it will be presumed to be lawful so long as it continues, until proof be shown otherwise.

The court erred in admitting the record of partition ; first, because to impeach the landlord's title was illegal ; second, if to prove that the plaintiff's title had expired, it was irrelevant, because long subsequent to the period to which rent was claimed of the defendant.

If the court did not err in admitting the record of partition, it did err in rejecting, as evidence, the agreement of the plaintiff with Campbell and Wells ; because this agreement, first, recognized plaintiff's legality of possession ; second, showed a settlement for all rent up to date when Stoops abandoned the possession, and consequently establishes his right to recover from his sub-tenant rent up to that date.

*H. N. Hart*, for defendant in error, contended that the evidence shows that Devlin is liable to the heirs of Youce and

Basse for use and occupation, and that Stoops is a mere trespasser, and as such, not entitled to recover.

RYLAND, Judge, delivered the opinion of the court.

From the foregoing statement it will be seen, that the principles and rules governing suits between landlord and tenant must be invoked in the decision of this case.

Stoops, it seems, rented a lot of ground belonging to Basse and Youce, in the city of St. Louis, from one Wherry, the agent of the owners, for one year; that this renting was in 1842; that Stoops continued to occupy the same lot, and in November, 1844, he rented a part of the same lot to Charles Devlin, at \$4 per month, and that Devlin occupied the same until September, 1846, about 22 months.

It was shown that the lot was worth between \$9 and \$10 per month, making a joint occupancy reasonably worth \$4 per month. In 1848 proceedings were commenced by the owners to have partition of the lot between them. It being incapable of division, was sold, and was purchased by Messrs. Wm. M. Campbell and Joseph B. Wells. This was two years after the period for which Devlin is charged rent.

1. The defence consists, on the part of Devlin, in showing, that as Wherry, in 1842, only rented the lot to Stoops for one year, that Stoops' term had expired, and he was holding over and was a trespasser.

The presumption is, that Stoops was a renter from year to year; that after the expiration of the first year, he had continued in possession as a renter for another year.

2. The defendant rented of Stoops, and continued to use and occupy the premises conjointly with Stoops for nearly 22 months. As the presumption is in favor of Stoops being lawfully in the possession and occupancy, the defendant had no right to question his title to demand the rent, which, by agreement, he was to pay to Stoops. He cannot escape the liability to Stoops, by questioning his title.

The instructions, therefore, of the court, which placed upon Stoops the burden of showing his title, were improper. His

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possession and occupancy might raise the presumption of a continuance of the original terms, from year to year.

The record and proceedings of the suit in partition had nothing to do with the matter in controversy between these parties. These took place two years after the expiration of the time for which Stoops charges Devlin with the rent of the lot.

This testimony should have been excluded. But, after admitting this evidence, no reason is perceived why the agreement between Stoops and Campbell, one of the purchasers of the lot, about the rent and former occupancy, should have been excluded. The court erred in admitting the record and proceedings of the partition suit. After having admitted that evidence, it was wrong not to admit the agreement between Campbell and Stoops.

The attempt, on the part of the defendant, to dispute the grounds of the plaintiff's right to recover, as set forth in the foregoing statement, was illegal and improper. The court failed to give proper instructions asked by the plaintiff; and the instruction throwing the *onus* of proof of title upon him, was also wrong.

The facts of this case do not present one in which the tenant is permitted to dispute his landlord's right to rent.

The judgment of the court below is erroneous; and the other Judges concurring, the judgment is reversed, and this cause is remanded, with directions to set aside the verdict, grant a new trial, and proceed in the case in accordance with this opinion.

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SEE & BROTHER, Appellants, vs. Cox, Respondent.

1. In a pleading under the New Code, it is not necessary to state the facts or circumstances by which the ultimate fact relied on is to be proved.

*Appeal from St. Louis Court of Common Pleas.*

On the 18th of July, 1851, the appellants instituted a civil action in the Common Pleas Court of St. Louis county.

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Their petition charged the respondent with executing a note annexed to the petition, and prayed judgment against him, for the amount of the note.

The note was in the words and figures following, viz :

“\$1,313 98-100. PHILADELPHIA, Aug. 14, 1850.

Six months after date, *we*, the subscriber, residing in Hannibal, — county, state of Missouri, promise to pay to the order of See, Brother & Co. thirteen hundred and thirteen dollars 98-100, without defalcation, for value received.

J. W. RHODES,  
By his attorney  
W. B. COX.”

The respondent demurred to the petition, and assigned the following causes :

1. The petition shows no cause of action.
2. The petition is too uncertain to maintain the prayer thereof.
3. The note sued on, is the note of Rhodes, not Cox.
4. There must be some additional averment in the petition to make Cox liable on this note.

The demurrer was sustained by the court and the plaintiffs appealed. The assignment of errors raises the question whether said demurrer was properly sustained.

*Knox & Kellogg*, for appellants, contended, that under the New Code, the allegation in the petition, that the defendant executed the note sued on and annexed to the petition, and that the note was due and unpaid, constituted a cause of action, and that under that allegation, they might show, either that the defendant was a partner of Rhodes, or that he executed the note as agent, without authority, and thus was liable.

*Glover & Campbell*, for respondent, contended that the averment of the execution of the note must be taken, to mean, *in manner and form, as it appeared* annexed to the petition ; and that to allow the plaintiffs, under this averment, to prove the liability of the defendant by extrinsic facts, would operate as a surprise.

GAMBLE, Judge, delivered the opinion of the court.

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Fallon v. Murray & Sullivan.

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The petition in this case alleges, that the defendant, *by his promissory note*, thereto annexed, *promised, for value received, to pay* plaintiffs, &c. The note appears to be signed "J. W. Rhodes, by his attorney M. B. Cox."

The allegation in the petition is to be examined and construed, under the direction of the 5th section of article 7th of the Code, which directs that, "in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties." The proper effect of the pleading, when a petition is to be examined, is to state the facts, "in such manner as to enable a person of common understanding to know what is intended." It is not necessary, nor is it proper to state in a pleading the facts or circumstances by which the ultimate fact relied upon is to be proved. Here, the fact is expressly alleged, that the defendant, by the note, promised to pay the plaintiffs. The proof of that fact may be, by showing, either that the defendant was a partner of the person in whose name, as principal, it was executed, or that the defendant made the note without authority from the principal. In either case, as a matter of law, he would be held to have promised to pay the plaintiffs, and the allegation would be sustained.

The demurrer should have been overruled. The judgment will be reversed and the cause remanded.

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FALLON, Plaintiff in Error, *vs.* MURRAY & SULLIVAN, Defendants in Error.

1. In a suit by A. against B., for the price of a cow sold by B. to A., the record in a suit between A. and C. who claimed to own the cow, in which there was a judgment in C's. favor, is not competent evidence to show title in C., nor for any other purpose, unless B. had notice of the suit.
2. The person of whom B. bought the cow, is a competent witness for him, in such a suit.



*Error to St. Louis Law Commissioner's Court.*

*A. P. & P. B. Garesche*, for plaintiff in error, contended that the transcript of the record in the suit between Fallon and Harrison was competent, for the double purpose of showing that a verdict had been rendered for Harrison in that suit, and the amount of costs expended by Fallon in its prosecution. It was not offered to prove title in Harrison.

The court below erred in admitting the testimony of the witness, Samuel Rowley.

*H. N. Hart*, for defendant in error, contended that the court below committed no error, either in admitting the transcript or the testimony of Rowley. The transcript was of a suit between different parties, of which defendants had no notice.

RYLAND, Judge, delivered the opinion of the court.

This was a suit brought by the plaintiff, against Murray & Sullivan, for the recovery of the price of a cow, which the plaintiff alleged he had bought of the defendants, and which had afterwards been taken from the plaintiff by James Harrison, he having the better title thereto, the plaintiff averring, that the defendants did not own the cow at the time they sold her to the plaintiff.

The defendants obtained judgment before the justice of the peace, on the trial of this suit. The plaintiff, thereupon, appealed to the Law Commissioner's Court. On the trial in that court, the defendants again obtained judgment. A motion was made for a new trial, overruled, excepted to, and the case is brought here by writ of error.

1. From the bill of exceptions, it appears, that the plaintiff offered below a record of a suit brought by him against one James Harrison, for a cow, which the plaintiff delivered up to Harrison, and then sued him for. This, the court refused to permit to be read, the plaintiff having given no notice of the suit between himself and Harrison to the defendants. The plaintiff contends, that this record is the best evidence of the

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amount of costs in that suit. That may be; but what have the costs of that suit to do with this action? It is not pretended that the record in that case is any evidence, showing to which one of these parties the cow belonged. If the plaintiff had taken the precaution to have notified the defendants in this action, of the suit between him and Harrison, they might have enabled him, probably, to succeed in his suit; or, if he had held on to his cow, and let Harrison sue him, then given the defendants notice, they might have brought evidence enough to defeat Harrison. As it is, the court did right in excluding the transcript. As well might the plaintiff have offered the transcript of any other suit. It had nothing to do with the action then pending.

2. The plaintiff also excepted to the evidence of the person who sold the cow in Illinois to the defendant, which they sold to the plaintiff. This witness proved that the cow, which Harrison got from the plaintiff, was not the one which he sold to the defendants, and, consequently, was not the one they sold to the plaintiff, as there was evidence showing that they sold to plaintiff the one that the witness sold to them. There is no objection to this witness, and the court properly admitted him.

Upon the whole case, there is nothing requiring the interposition of this court. The other Judges concurring, the judgment below is affirmed.

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HUNT, Respondent, vs. HERNANDEZ, Appellant.

1. The Law Commissioner of St. Louis county cannot affirm the judgment of a justice of the peace, for the non-payment of the fee given him by the act of February 17th, 1851, upon the filing of the appeal papers.

*Appeal from St. Louis Law Commissioner's Court.*

The respondent, Hunt, sued the appellant, Hernandez, on account for \$90, before Justice Johnstone, on the 3d of January, 1851. Justice Johnstone gave judgment for the plaintiff. Hernandez prayed an appeal to the Law Commissioner's

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Court, which was duly perfected, and a transcript deposited in the office of the law commissioner, on the 25th of July, 1851, but not filed, on account of the non-payment of the fee of one dollar. On the 7th of August, 1851, Hunt, the plaintiff in said suit, appeared, paid the tax of one dollar, and caused the transcript to be filed, and the judgment was affirmed by the law commissioner, on the ground that the defendant had not paid it. The appellant (defendant below,) filed a motion and affidavit, to set aside the judgment of affirmance and reinstate the cause on the docket, which motion was overruled. The affidavit is made by the wife of the appellant, and states that the appellant was absent when the trial was had before Justice Johnstone. He was a pilot on the steamboat Duroc; that Asher, her son-in-law, prayed an appeal, and it was duly perfected; that she had paid Justice Johnstone one dollar and a half, having understood from said justice that this sum was all that was required; that she believed every thing had been done necessary to have the case entered on the docket in the Law Commissioner's Court; she did not know another dollar was required, was not aware that any rule had been adopted by the court, as to said tax of one dollar; that the dollar was tendered on the 12th of August, 1851, and refused by the court; that the appellant had returned, and left again, under the belief that the case was regularly before the court, and that he had a good and substantial defence, and alleges want of jurisdiction, and offers to pay the tax of one dollar.

The grounds of the motion are :

1. The reasons set out in the affidavit.
2. The judgment of affirmance was illegal and oppressive.
3. There was no rule of the court generally known.
4. Want of jurisdiction.

*Morehead*, for appellant, insisted that the fee given the Law Commissioner, by the 12th section of the act of 1851, is a personal benefit, and he may either remit it or give credit for it. If he does not wish to give credit, he must refuse to file the transcript, or to take possession of the case. If he files

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it, no matter on whose application, he must try the case on its merits.

GAMBLE, Judge, delivered the opinion of the court.

It is unnecessary in this case to consider the sufficiency of the cause set forth in the affidavit, filed in support of the motion made to set aside the judgment of affirmance entered by the law commissioner.

Although great prominence is given to the matter of fees to be paid to the law commissioner, in every act which concerns his office, and although the act of 17th of February, 1851, in the 12th section, allows him to charge a fee of one dollar, to be paid on the filing of "each appeal case" from a justice of the peace, there appears to be no provision for his affirming the judgment for the non-payment of the dollar. The transcript, in this case, begins by reciting that the appeal was filed on the 25th of July, 1851, and then sets out the proceedings before the justice, and an appeal perfected on the 19th of July. On the 7th of August following, the law commissioner orders "that the judgment of the justice rendered herein, be affirmed, appellant making default in the payment of the fee, given by law to the commissioner, upon the filing of the appeal papers." The appellant moved to set this order or judgment aside, and the motion was overruled.

When the appeal was filed, if it was filed upon credit, the commissioner must collect his dollar with his other fees. If some other person than the appellant paid the dollar, to give the commissioner possession of the case, he must proceed to determine the case upon its merits. He is not allowed to take possession of the case for the purpose of affirming the judgment of the justice, because his dollar has not been paid.

Let his judgment be reversed and the case be remanded.

COLEMAN, Plaintiff in Error vs. McANULTY, Defendant in Error.

1. A judgment rendered in favor of a plaintiff, who had died before its rendition,² is not void.
2. Proceedings to set aside an irregular judgment will not affect any one who has acquired a title under it, unless he is made a party.

*Error to St. Louis Circuit Court.*

The facts are sufficiently stated in the opinion of the court.

*T. T. Gantt*, for plaintiff in error.

I. The Circuit Court had no jurisdiction of the parties in the case of *Boyd vs. Coleman*, garnishee of *Wooley*.

Coleman was alive, but *Boyd* being dead when execution was issued summoning Coleman as garnishee, was not before the court for any purpose. No judgment could have been rendered against *Boyd*. The court, then, was not possessed of the case, not having two parties before it, and all that was done was null and void.

II. No question is made, but that if the judgment had been merely erroneous, the title of a purchaser under it could not have been impeached. But the want of jurisdiction, either of the subject matter of a suit or of the parties to it, is a fatal defect, constituting all the proceedings void, *ab initio*.

No authorities in point, have been discovered, except 3 *Yerger*, 395, which is entirely so. It, perhaps, requires apology to cite authorities to show, that where only one party, and he a plaintiff, is before a court, the judgment is (unless there be some statutory constructive appearance for the defendant, in which case, both parties are for the purpose of the law before the court,) an absolute nullity. *Borden v. Fitch*, 15 Johns. Rep. 140.

As to distinctions between void and voidable process, see *Woodcock v. Bennett*, 1 Cow. 711, *et seq.* see particularly pp. 734-5.

*Geyer & Dayton*, for defendant in error, contended that the judgment against Coleman, after the death of *Boyd*, was not void, but merely voidable: that its irregularity cannot be

taken advantage of in any collateral proceeding, and that titles acquired under an execution upon such a judgment, will be protected, especially when, as in this case, they have long been acquiesced in. *McNair v. Biddle*, 8 Mo. 257. *Voorhees v. Bank of United States*, 10 Pet. 472. Tidd's Practice, 936. *Henry v. Ferguson*, 1 Bailey, 512. 1 Nott and McCord, 408, (S. C.) *Thompson v. Tolmie*, 2 Pet. 157. *Armstrong v. Jackson*, 1 Black. 210. *Jackson v. Bartlett*, 8 Johns. 361. *Jackson v. Delany*, 13 Johns. 535. *Jackson v. Robins*, 16 Johns. 537. *Jackson v. Cadwell*, 1 Cow. 622, 641, 644-5. *Reed v. Austin*, 9 Mo. 722. *Carter v. Spencer*, 7 Iredell, 14. *Granger v. Clark*, 9 Shep. 128. 3 Green, 224. *U. S. Bank v. Voorhees*, 1 McLain, 450. *Wake v. Hunter*, Taylor's Rep. (N. C.) 571. *Ozly v. Mizle*, 3 Murph. 250. *Smith v. Kelly*, ib. 507. *Thompson v. Hodges*, ib. 546. 3 How. (Miss.) *Doe v. Snyder*. *Hoskins v. Helm*, 4 Litt. 309. *Speer v. Semple*, 4 Watts, 367. *Butler v. Haynes*, 3 N. H. 21. Tidd's Practice, 915. *Clark v. Withers*, 2 Ray. 1072. Same case, 1 Salk. 322. *Hanson v. Barnes' Lessee*, 3 Gill and J. 359. *Jones v. Jones*, 1 Bland, 473. *Goodwin v. Floyd*, 10 Yerg. 520. Same case, 8 Yerg. 491. 5 Black. 328. *Magruder v. Peter*, 11 G. and J. 217. 13 Pet. 6. *Giles v. Pratt*, 1 Hill, (S. C.) 239. *Titcomb v. Union Insurance Company*, 8 Mass. 326. *Homes v. Starkweather*, 17 Mass. 240. *Harwood v. Murphy*, 1 Greene, 193. 10 Wheat. 192. *Wittenberg v. Wittenberg*, 1 Mo. 226.

The case of *Kelly v. Hooper*, 3 Yerg. 395, cited by plaintiff's counsel, is not in point. The defendant in that case died while a suit was pending, yet the plaintiff proceeded to take a judgment against him, and afterwards brought suit against his executors, to get a judgment upon that judgment. It was held that he could not do so. This is no more than saying that, *as between these parties*, the judgment was not valid. In the case at bar, the facts and the question are materially different.



SCOTT, Judge, delivered the opinion of the court.

The petition in this case stated, that the appellant, Samuel M. Coleman, was the legal representative of James Coleman, in respect to the undivided half of a tract of land, situated in St. Louis county. That a judgment was recovered by Jno. P. Boyd, in the St. Louis Circuit Court, against Abraham Wooley; and James Coleman being summoned as a garnishee, a judgment against him, as a debtor of said Wooley, was entered at the suit of the said Boyd, who had departed this life at the time of the said garnishment. On the judgment against Coleman, an execution issued, by virtue of which, in March, 1834, his interest in the land above mentioned, being an equitable one, was sold to the respondent, who afterwards instituted proceedings in equity against Joseph Papin, the trustee of the land, and obtained a deed conveying the legal title of the same to him. In April, 1835, on motion of Coleman, the judgment against him was set aside and for nought held, it appearing to the court that the plaintiff, Boyd, had died before the judgment was rendered against Coleman. James Coleman afterwards died, leaving the respondent, his son. McAnulty was no party to the proceedings instituted to set aside the judgment. The petition prayed that the title of the respondent might be decreed to the appellant, and for the rents and profits of the land described. A demurrer to the petition was sustained, and the cause brought here.

1. The only question in the cause is, whether the judgment against the garnishee was void and a nullity, by reason of the death of Boyd, before it was rendered. In maintaining the affirmative of this question, the appellant is not supported by any of the cases cited by him. The case of *Borden v. Fitch*, 15 J. R. 145, and that of *Kelly v. Hooper*, 3 Yerger, 395, are both within the principle prevailing in some of the states, allowing the judgment of another state to be impeached for lack of jurisdiction. 2 Cow. and Hill, 915. All that is contained in the case of *Woodcock v. Bennett*, 1 Cow. 735,

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Coleman v. McAnulty.

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in relation to this matter, is taken from the case of *Parsons v. Loyd*, 3 Wils. 341, where it is said, that "there is a great difference between erroneous process and irregular (that is to say, void) process; the first stands good and valid until it be reversed; the latter is an absolute nullity from the beginning." This was a suit against a plaintiff in an action, for suing out a void *capias ad respondendum*, which had been set aside. In the same case, it was said that there was no remedy against the officer, for he was obliged to obey a writ emanating from a court of general jurisdiction. This is unquestionable law, that a writ, regular on its face, emanating from a court of superior jurisdiction, is a justification to the officer acting under it; and it is a general rule, that wheresoever an officer can justify under a writ, he can pass a title by a sale under it, if all other pre-requisites to a sale have been complied with. *Cox v. Nelson*, 1 Mon. 95. *McKinney v. Scott*, 1 Bibb, 155. *Reardon v. Searcy's Heirs*, 2 Bibb, 202. *Coleman v. Trabue*, 2 Bibb, 518. In 2 Tidd's Practice, 936, it is said, "if the judgment or execution be irregular, the party cannot justify under it, for that is a matter in the privity of himself or his attorney; and if the sheriff or officer in such case, join in the same plea with a party, he forfeits the benefit of his defence. The sheriff or officer, however, may justify under an irregular judgment, as well as an erroneous one, for they are not privy to the irregularity. And, so as the writ be not void, it is a good justification, however irregular, and the purchaser will gain a title under the sheriff; for it would be very hard, if it should be at the peril of the purchaser, under a *fieri facias*, whether the proceedings were regular or not." In the case of *Warder v. Tainter*, 4 Watts, 278, the court says, the authorities are abundant to show, that in no case is a judgment, rendered by a court of general jurisdiction, considered void, on account of the death of the defendant having taken place before the rendition of it: that, at most, it is only voidable. If the death of the defendant will not render

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Richardson v. Jones.

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a judgment void, no reason is perceived why the death of the plaintiff should have that effect. There being, then, a valid sale under a writ, supported by a judgment not void, the title of Coleman passed by it.

2. The proceedings to set aside the judgment did not affect the respondent, as he was no party to them.

Judge RYLAND concurring, the judgment will be affirmed.

Judge GAMBLE not sitting.

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RICHARDSON, Respondent, vs. JONES, Appellant.

1. A., the maker of a note payable to B., was summoned as garnishee in an attachment suit against B., before a justice of the peace. C. filed an interplea, claiming the debt evidenced by the note, by endorsement from B., before the date of the garnishment. Judgment went against him on the interplea, from which he took no appeal. Afterwards, he withdraws the note and brings suit on it against the maker. *Held*, the judgment on the interplea is a bar to the action.

*Appeal from St. Louis Law Commissioner's Court.*

C. C. Carroll, for appellant.

H. N. Dedman, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The record of this suit presents the following facts :

On the 2d day of May, 1850, Jonathan Jones executed his note, payable one day after date, to J. W. Richardson, for \$245 75. On the 19th of June, 1851, Abijah W. Corey sued J. W. Richardson by attachment, before Justice Kretschmar. Jonathan Jones was summoned as garnishee on the 19th of June, 1851, to answer as to his indebtedness to J. W. Richardson. The note of Jones to Richardson was assigned to his sister, R. Jane Richardson, the plaintiff in this suit, about the first of July, 1850.

In the progress of the suit of Corey against J. W. Richardson, R. Jane Richardson appeared before the justice, by her next friend, Wm. S. McKnight, and filed her interplea, claiming the debt from Jones, the garnishee, and exhibited the note assigned to her. The garnishee answered, that he had executed his note to J. W. Richardson for the sum of \$245 75 ;

that various payments had been made, reducing the amount due on it to about \$90 ; that he had understood, that Richardson had assigned the note to his sister, shortly after it became due ; that he did not know that there was any consideration for the assignment ; he had understood that Richardson had assigned it to his sister, to enable her to pay her board and other expenses.

On the trial of this interplea, the justice heard both parties, the claimant and the plaintiff, and rendered judgment for the plaintiff against the claimant, by which, the garnishee was adjudged to pay money on the note to the plaintiff Corey.

Neither party appealed from the judgment. It remained in full force, and the garnishee, under it, paid the money, or, at least, is bound to pay it.

The claimant in the interplea then withdrew the note, and commenced the action against Jones. He answered, denying that he owed the plaintiff anything ; stating that the matter had been adjudicated between them, before Justice Kretschmar, and he had been adjudged to pay the balance on the note to Corey ; and exhibited the transcript of the record and proceedings in the aforesaid attachment suit.

The law commissioner, upon the facts in this case, declared that the assignment of the note purports a valuable consideration, and that the judgment rendered by Justice Kretschmar against the defendant, as garnishee, in favor of Corey, is no bar to this present action, unless the defendant, Jones, prove that the assignment of the note, from Richardson to his sister, was without consideration. The law commissioner found for the plaintiff, and the defendant moved for a new trial ; this motion being overruled, he excepted, and brings the case here by appeal.

The law commissioner erred in declaring the law of this case. The judgment of the justice, by which the defendant was, upon the interplea of the plaintiff in this suit, condemned to pay the amount due on the note to the plaintiff in the attachment suit, remaining in full force, without any appeal being taken by the

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claimant below, is a bar to the action wherein she seeks again to have that matter tried.

She appeared in the attachment suit and claimed the debt from Jones as due to her, as the assignee of the note. This claim upon the interplea was tried before a court of competent authority and jurisdiction, and its judgment in law remaining unreversed, no effort being made to have a new trial on it, and no appeal being taken, is final and conclusive against this present plaintiff. Her remedy was to have appealed from the judgment of the justice on the interplea, against her; and failing to avail herself of that, she cannot sue on the note again.

The justice may have erred; his judgment on appeal might have been reversed; but the judgment, as it now stands, is good in law to bar the present action. We cannot tell what reasons the justice below may have had for his judgment; he may have been satisfied that this transfer of the note from Richardson to his sister, was fraudulent as to his creditors.

The other Judges concurring, the judgment below is reversed.

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KEISER'S ADMINISTRATOR *et al.*, Defendants in Error, *vs.*  
MOORE & CHAPMAN, Plaintiffs in Error.

1. When a party has filed one interplea in an attachment suit, and on the trial has taken a nonsuit, it is no error for the court to strike out a second interplea filed by him in the same case, without leave of court.

*Error to St. Louis Court of Common Pleas.*

GAMBLE, Judge, delivered the opinion of the court.

The plaintiffs, having instituted a suit by attachment against Ephraim Moore, the present appellants, Moore & Chapman, on the 11th of October, 1848, filed their claim to the property attached in the hands of the garnishee, as interpleaders. Issue was made on this claim and was tried on the 13th of March, 1850. Upon the trial, the interpleaders took a nonsuit, and

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having excepted to the opinions of the court, brought the cause to the Supreme Court, where the judgment of the Court of Common Pleas was affirmed. The decision of this court was certified to the Court of Common Pleas on the 10th of May, 1851, and on the 26th day of that month, the same persons, without any leave of the court, file their claim to the property attached, in the same form as that in which it was first exhibited. On motion of the plaintiffs, the court struck out this second claim of property, as having been filed without any leave from the court, and having been filed contrary to the agreement of the interpleaders, by their attorney. The written agreement, signed by the attorney, is spread upon the record, but will not be further noticed in deciding the case.

As the interposition of a claim to the property attached delays the proceedings in the original action, it is certainly important, that it should be made and determined as speedily as practicable. The 39th section of the attachment act, which allows the claimant to interplead, provides, "that the issue shall be tried without any unnecessary delay, and no judgment shall be rendered against the garnishee in whose hands the property or effects may be, until the interpleader shall be determined." In the present case, the same parties who had claimed the property and had their right to it tried in March, 1850, and the judgment of the court affirmed in this court, come again in May, 1851, and without any permission of the court, renew their claim. If this proceeding be allowable, the plaintiffs, whatever may be the merits of their claim, will never get a judgment against the garnishee.

The court rightly struck out the claim filed by the interpleaders, under the circumstances of this case, and the judgment is affirmed, with the concurrence of the other Judges.



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Leith v. Steamboat Pride of the West.

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LEITH, Respondent, *vs.* STEAMBOAT PRIDE OF THE WEST,  
Appellant.

1. When a case is tried by the court below, sitting as a jury, and no exception is taken, the Supreme Court will not review its finding of the facts.

*Appeal from St. Louis Law Commissioner's Court.*

*P. A. Ladue*, for appellant.

RYLAND, Judge. This was a suit before the law commissioner of St. Louis, on a contract of affreightment.

The boat undertook to transport a pianoforte from New Orleans to St. Louis, for the plaintiff. The plaintiff alleged that the piano was injured and damaged in this transportation. The captain of the boat appeared to the action, and filed his answer, denying that any injury was done to the piano, while it was being transported and delivered to the plaintiff.

The parties submitted the issue to the decision of the commissioner, without a jury. He found for the plaintiff and assessed the damages at fifty dollars.

No exception was taken on the trial; the testimony was heard, and the defendant (the decision being for the plaintiff,) moved for a new trial; his motion being overruled, he appealed to this court, having tendered his bill of exceptions, in which the evidence on the trial is preserved.

This case, therefore, presents to this court nothing, except the finding of the court below on the evidence, and we are called on to review that finding.

It has long been the practice of this court to refuse to interfere in such cases, and we see no reason now to depart from it. The other Judges concurring, the judgment below is affirmed.

## HARRISON, Respondent, vs. PAGE, Appellant.

1. Page vs. Scheibel, 11 Mo. Rep. 167, affirmed.
2. To establish that a lot was a common field lot, within the meaning of the act of 1812, it is not necessary to show that the village authorities under the Spanish government exercised any authority over it or its owner.
3. A common field lot was one of a series of lots in the vicinity of the village, occupied and cultivated by the inhabitants of the village in a common field.
4. That a lot was not embraced within a Spanish survey of the common fields, is slight, if any evidence, that it was not a common field lot.
5. Where a deed, describing the land conveyed by reference to a Spanish concession, was executed at a time when such concession had been located and confirmed by the United States government, and there is no call in the concession inconsistent with such location, the deed will be held to pass the land on which the concession has thus been located.

*Appeal from St. Louis Court of Common Pleas.*

This was an action of ejectment, brought by Harrison in the St. Louis Court of Common Pleas, on the 29th of August, 1848, against Francis W. Page, for two by forty arpens of land, lying in the Grand Prairie, about three miles from St. Louis. It was tried in October, 1850, and resulted in a verdict and judgment for the plaintiff, for some two or three acres of the eastern end of said tract.

The plaintiff's title was a confirmation, by the recorder of land titles, to Chancillier's representatives, referring to livre terrien, No. 1, page 9, for the warrant or order of survey. He gave in evidence the survey of this confirmation by the United States, numbered 1561; also, the survey by Duralde of lots of Picard, and of Mainville *dit* Dechesne, in the same range of common fields, a little further north, taken from livre terrien, No. 2. The Picard and Mainville lots were side by side, and in describing them, Duralde says as follows: In the Picard lot, "et tient immédiatement d'un coté à celle de Joseph Tayon, et de l'autre en partie au domaine du roi, et en partie à celle du Sieur Dechesne, *celle-ci*, étant plus avancée vers l'est de neuf arpents trente six pieds," &c; and in Mainville *dit* Dechesne's lot, "est situé et tient immédiatement d'un coté à celle du nommé Routier et de l'autre en partie au do-

maine du roi, et partie à celle du nommé Picard, *celle-ci* étant plus avancée vers l'ouest de neuf arpents, trente six pieds," &c.

The plaintiff also gave in evidence a judicial sale of the property of Chancillier, wherein it appears that a half arpent of land in the Grand Prairie was sold to Louisa Dechamp, widow of Chancillier; also, deeds as follows:

5th of April, 1834. Alexis Chancillier and Louis Chancillier to Matthew R. Boyce— $\frac{1}{2}$  by 40 arpens, residue of 2 by 40 arpens granted to Chancillier in Grand Prairie, in livre terrien. The grantors say they are grandsons of Chancillier.

26th of June, 1835. Strother and wife and Lawless to said Boyce— $\frac{1}{2}$  arpent by 40 in Grand Prairie.

12th of September, 1828. Marie Louise Laroque, widow of Basil Laroque, to George F. Strother—all her right in all the property of her first husband, Chancillier, and  $\frac{1}{2}$  arpent by 40.

12th of May, 1834. Josephine Chancillier and Genevieve Chancillier to said Boyce—same description as in the deed of Alexis and Louis. They say they are grand-daughters of Chancillier.

25th of August, 1836. Gabriel Marlow and Julia his wife, to said Boyce, (said Julia being a grand-daughter, as she says.) Same description.

9th of May, 1847. Hypolite Bernard and Marie Therese his wife, to Boyce—2 by 40 arpens in Grand Prairie, bounded south by Calvè and north by Kiercereau.

21st of August, 1847. Charles F. Lefavre and Cecile his wife, to Willis L. Williams—their interest in 2 by 40 arpens, granted to Chancillier; livre terrien, No. 1, page 9, and being survey 1561.

10th of May, 1848. Matthew Boyce to Williams—a part of said 2 by 40 arpens, survey 1561—eastern part, containing about seven arpens.

10th of May, 1848. Williams and wife to Harrison—same as in the last deed, seven arpens.

According to the survey of the United States, of the Chancillier field lot of 2 by 40 arpens, its eastern end was on a

line with the surveys of the adjacent common field lots, at the north, till reaching the division line between the lots of Picard and of Mainville, and there, is an offset of nine arpens and thirty-six feet to the west, so that from that point, the base or eastern line of those common field lots in the Grand Prairie, going towards the north, is 9 arpens 36 feet further west than the eastern line of the common fields south of that point. The defendant contended, that the field lots, south of the Picard tract, were improperly located and surveyed so far towards the east; and that by the true reading and construction of Duvalde's surveys, the offset should not have been so made, as to bring down the field lots, comprehending Chancillier, 9 arpens 36 feet further to the east than the base line of the Picard lot, and the other lots north of it. According to the location contended for by the defendant, the Chancillier tract would not interfere with the defendant's land; but, by its location so far to the east, its eastern end interfered with defendant's possession and enclosure, some two or three acres.

There was evidence given by plaintiff, tending to prove, that the location made by the United States survey was correct; and, on the other side, the defendants gave evidence, tending to prove, that the said concession to Chancillier was at another place, and nearly half a mile further north, in said range of common fields; and that the offset of 9 arpens and 36 feet should not have been so made, as to bring down the common field lots south of Picard, that distance further east than the eastern line of the Picard lot and the lots to the north of it.

The following instructions, asked by the plaintiff, were given by the court:

1. If the jury find, that for several years prior to the 20th of December, 1803, there were lots of one or more arpens front by 40 in depth, possessed and cultivated as common field lots, in the Grand Prairie of St. Louis, adjoining those which were granted, and that such lots were occupied, possessed, used or cultivated, in the same manner as the granted lots of the same description, then the lots so occupied, possessed, used and

cultivated, are common field lots, within the meaning of the act of congress of the 13th of June, 1812, although there may have been no written grant, or official survey thereof by the Spanish government.

2. If the jury find that Chancelier, or his representatives, claimed such a lot of 2 by 40 arpens, in the Grande Prairie, and possessed or cultivated the same prior to the 20th of December, 1803, then the same was confirmed by the act of the 13th of June, 1812, unless the same was abandoned by said Chancelier, or his representatives.

3. The confirmation to Chancelier's representatives, given in evidence, is a confirmation of the title to 2 by 40 arpens in the Grande Prairie common fields, as cultivated and possessed by Chancelier, or his representatives, prior to the 20th of December, 1803, and the survey No. 1561, is evidence of the extent and boundaries of said confirmation.

4. If the jury find from the evidence, that Chancelier, or his representatives, mentioned in the report of the recorder, possessed or cultivated a lot or parcel of land of 2 by 40 arpens, in the Grande Prairie common fields, prior to the 20th of December, 1803, the title to said land was vested in Chancelier's representatives, notwithstanding it may appear that it does not correspond with the description of the concession referred to by the recorder of land titles, in his report, given in evidence.

5. If the land in controversy is within the boundaries of the confirmation to Chancelier's representatives, then Martin Coontz and his representatives acquired no title thereto, by virtue of the New Madrid certificate, location and survey, and other documents given in evidence by the defendants.

In addition to the above, the court, of its own motion, gave the following :

1. A common field lot, within the meaning of the act of June 13th, 1812, is a lot in the neighborhood of one of the villages or towns enumerated in said act, used by an inhabitant of said town or village for purposes of cultivation ; said common

field lots being in the form of parallelograms, usually from 1 to 3 arpens in front by 40 in depth, lying adjacent to each other, in the same general ranges of lots, all in the same range being protected by a common fence in front, and each of them separated from that adjoining, by a small strip of land a few feet in width, left uncultivated, so as to mark its limit or boundary, and the division lines between the respective lots of said cultivators.

2. The United States survey, No. 1561, offered in evidence by the plaintiff, is *prima facie* evidence of the extent and correctness of the boundaries of the lot confirmed to Louis Chancellor, or his legal representatives, and should be received as correct, unless the defendant has proved to the satisfaction of the jury, that it is erroneous.

3. If the eastern line of the United States surveys, Nos. 1296, 1461, 3303 and 3304, conforms to the eastern boundary of the same lots, as surveyed by authority of the Spanish government, and the land confirmed to Louis Chancellor, or his legal representatives, is 2 by 40 arpens, lying adjoining and south of the United States survey No. 3304, the jury should consider that fact as corroborative of the correctness of said United States survey No. 1561.

4. If the jury believe from the evidence, that the land in controversy in this suit, is within the boundaries of the tract or lot of 2 by 40 arpens, in the Grande Prairie common fields, confirmed to Louis Chancellor, or his legal representatives, and that said Chancellor had a grant or concession from the Spanish government, of only one such lot in said common fields, and that the confirmation of said lot by the act of 1816, given in evidence, refers to said concession or grant, recorded in Livre Terrien, as the lot confirmed, and said concession or grant locates the said lot in the Grande Prairie west of St. Louis, then the descriptions in the deeds of Marie Louise Deschamps, Alexis Chancellor, and Louis Chancellor, Joséphine and Geneviève Chancellor, and of Gabriel Marlow and wife, are sufficient to pass the title of said grantors to the lot in the Grande Prairie



common field, confirmed to said Chancellor, or his representatives, and sued for in this action.

5. If the jury find from the evidence, that the United States survey No. 1561, is incorrect, and that the eastern boundary line of the common field lots in the Grande Prairie common fields, lying south of the Picard lot, ought not to be located so as to extend further east than the eastern line of said Picard common field lot, and others north of it, and that the 2 by 40 arpens, embraced in survey No. 1561, is one of the Grande Prairie common field lots, they will find for the defendant.

The following instructions, asked by the defendant, were refused by the court :

1. If the jury find from the evidence, that the grant or concession to Louis Chancellor, dated 20th January, A. D. 1767, given in evidence by the plaintiff, does not include any land which was in the possession of the defendant, at the commencement of this suit, they are then instructed, that there can be no recovery in this action, for any interest conveyed by the deeds of Marie Louise Deschamps, Alexis Chancellor, Louis Chancellor, Josephine Chancellor, Geneviève Chancellor, Gabriel Marlow and wife; if the jury believe from the evidence that the grant referred to in said deeds, is the said concession to Chancellor.

2. If the jury find from the evidence, that said concession to Louis Chancellor, given in evidence by the defendant, does not include any land in possession of defendant, at the commencement of this action, and sued for in the same, and that the land so sued for, is no part of an outlot or common field lot belonging to the old town of St. Louis, they will find for the defendant.

3. That in order to constitute the 2 by 40 arpens, included in survey 1561, *an out lot or common field lot*, within the meaning of the act of congress, approved 13th of June, 1812, entitled "an act making further provisions for settling the claims to land in the territory of Missouri," said tract must have been recognized as such under the Spanish government, and must have been appurtenant to the village of St. Louis

then, in such wise, as to be subject to the authorities of said village, in the same manner as those lots were, which were, without dispute, common field lots, belonging to said village.

4. That if the jury find from the evidence, that the land included in said survey 1561, was not included in the official surveys of the range of common fields in the Grande Prairie, under the Spanish government, and there were several other ranges of common field lots belonging to St. Louis then, and that all of them were surveyed under that government, and a record of such surveys was preserved, and still remains among the archives of the country; and if they further find, that there was no authority or control exercised over said tract by the town of St. Louis, or its officers, they are then bound to consider said tract, as not being an out lot or common field lot, embraced in the provisions of said act of congress of 13th of June, 1812, and as not confirmed by that act.

5. That if the jury find from the evidence, that the eastern boundary line of the common field lots in Grande Prairie common fields, lying south of the Picard lot, ought not to be located so as to extend further east than the eastern line of the said Picard field lot, and others to the north of it, and that the 2 by 40 arpens embraced in survey 1561, is one of the Grande Prairie common field lots, they will then find for the defendant.

6. That the survey by the United States, numbered 1561, given in evidence in this case, is merely *prima facie* evidence of the location of the claim, of which it purports to be the survey, and if the jury believe from all the evidence in the case, that said claim should have been located differently, or elsewhere, they are bound so to find.

*Spalding and Shepley*, for appellant.

I. The first instruction, asked on behalf of the defendant, ought to have been given.

1. The deeds referred to in that instruction, convey only what was embraced in the grant or concession to Chancellor which was given in evidence.

2. That concession, if it did not embrace the land pos-

sessed by the defendant, cannot be enlarged by the evidence or by a subsequent independent grant, so as to make the deeds embrace it.

3. The concession, as originally made, may not have embraced the spot possessed by defendant; first, because if located at the right place, it may have been a half mile or more further north; second, it may have been located too far east.

4. The case of *Page v. Scheibel*, 11 Mo. Rep. 167, does not help out the defendant's objection to the deeds. The question there was, what land was confirmed, but *here*, it is, *what land do these deeds describe?*

5. The deeds mentioned, convey the land embraced in the concession to Chancellor, given in evidence, made in 1767, and there is no other description. The plaintiff alleges, that that land is included in survey No. 1561. The defendants allege, that the land embraced in that concession, was far north of that place. Will land pass by a deed which describes a tract in another and different place?

6. The confirmation was on possession prior to the 20th of December, 1803, and in the confirmation, the recorder refers to said concession. What proof of possession he had, is not known nor where it was. But the land surveyed, No. 1561, has not the boundaries called for in the concession, nor, on the trial, was there any proof of them at that place where the survey was made.

7. The question, as to where the concession made was actually situated, and whether it included the possession of the defendant below, is left to the jury by this instruction, and this was right. For, 1st, the recorder does not say it was next to Kiercereau; but only says that it was confirmed on *possession* prior to 1803, and where was that possession? The surveyor does, indeed, locate it there, but a survey is only *prima facie* evidence. *Page v. Scheibel*, 11 Mo. Rep. 167. *Eberle v. Public Schools*, 11 Mo. Rep. 247; 2d, the Spanish survey of it, even if it were proved to have been there,

would not have altered the case. 4 How. 447-8, *Mackay et al., v. Dillon*. 4 How. 449, *Les Bois v. Bramell*.

II. The defendant's second instruction ought to have been given. The court should have told the jury that, if the land possessed by the defendant was no part of a common field or out-lot, it was not confirmed by the act of 1812, and that if the concession confirmed by the recorder did not include it, they could not find for the plaintiff.

1. This is different from *Page v. Scheibel*. That had an impossible call; it was in Grande Prairie and on *Little River*, and it could not be *both*. The recorder passed upon it, as having been in the Grande Prairie, and as having been possessed.

2. In the *Scheibel* case, the court says, that the concession describes the land; it is the same as if the recorder said, in so many words, *I confirm the land embraced in that concession*. If it describes land in another place, and the jury so find it, there could be no recovery.

3. The recorder does not recognize possession under this concession, at the particular spot where the plaintiff below claims.

III. The third of the defendant's instructions ought to have been given. It merely defines what an *out-lot* or *common field lot* is, and defines it correctly; and it is pertinent, because the plaintiff below proved actual cultivation, and claimed the ground as a *common field* or out-lot. 11 Mo. Rep. 264-5-6. 12 Peters, 442-3-4-5, 450.

IV. The fourth instruction was on the same point, and is *law*, and should have been given.

V. The fifth instruction asked by the defendant should have been given. It depends entirely upon an arithmetical calculation. The east line of the Picard field lot, is west of the eastern line of the Chancellor lot, as located by survey 1561, nine arpens, thirty-six feet; that is, 1771 feet English. Now, if this survey were pushed west that distance, or half of it even, it is mathematically certain, that it would not have interfered with the defendant's possession. 9 Mo. Rep. 603.

VI. The sixth instruction asked by the defendant, should have been given. It merely leaves the question of location to the jury, and there was testimony on behalf of the defendant, tending to prove it elsewhere.

There was evidence impeaching survey 1561, viz :

1. René Paul's construction of Duralde's survey.
2. Conclusion of Duralde's survey of Langlois, Routier and Kiercereau, given in evidence by the plaintiff ; "*celui-ci*" there, refers to the page then *using or being used*.
3. Brown's survey of out boundary of Grande Prairie common fields *approved*, and standing for twenty years in the land office, followed by Paul's.
4. The calls of the Mackay tract, Chatillon and others at the west end, showing that these lots must have extended further west than they are now surveyed.
5. The Chauvin or Tayon concession of forty by forty arpens, connected with Evans' testimony, tends to show that there were no common fields there.
6. The location of the Chancelier concession by survey 1561, is not sustained by Duralde, and it is not matter of law, that the stone found by Cozzens was put there by the Spaniards.
7. The concession to Chancelier was *confirmed*, and this confirmation is surveyed in survey 1561 ; but said *concession* and *confirmation* did not lie at that spot. See the concessions to Chancelier, Hervieux, Laclède, Condé, Bacanné.

*E. Bates*, for the same.

I. In so far as the plaintiff claims by a Spanish concession or grant, his location must conform to the governing calls of the grant. For, as the surveyor is not a judge of title, and has nothing to do with it, his only function is, to mark and identify the position, boundaries and extent of the land, as *granted and confirmed*. If he find the true position occupied by a previous survey, still he cannot give other land in another place ; he must survey the confirmed grant, without reference to any conflict of title, or claim, with other persons.

II. The only call of Chancelier's grant is Hervieux and the only call of Hervieux's grant is Chancelier (except the indefinite calls for the king's domain at the ends of the tract.) Each calls to be bounded by the other on *one side*. Which side is not stated, but it is beyond dispute, that, in so far as they claim by grant and written confirmation, the surveyor must place them side by side, or refuse to locate them at all, for the papers give no other indices of locality.

III. Here, Chancelier's lot is arbitrarily placed between René Kiercureau and Calvé's surveys, to neither of which has it any paper reference, but the contrary. For the recorder, on the face of the confirmation, refers to the concession, which calls for Hervieux as the only specified boundary.

If it be said that the surveyor placed it there upon information of witnesses, examined on the spot, I have two answers :

1. He has no right to hold such an inquisition, whereby the terms of the grant are falsified, and the rights of others put in jeopardy by his *ex parte* proceedings—he must survey the land according to the descriptive list which the recorder is required to furnish.

2. He was not surveying a *possession*, or a lot whose title originated in possession, but a *confirmed grant*, in which the quantity and some of the metes and bounds are set forth. His information obtained from witnesses in the field, could not have been of the grant or confirmation, but only of possession or cultivation.

IV. As to possession, certainly if, at the date of the act of 1812, a man had any "right, title or claim" to a "town lot, out-lot or common field lot," his right, title or claim was confirmed *by that act*, provided he had "inhabited, cultivated or possessed" said lot prior to the change of government, but not otherwise. The thing he claimed must have been a *lot*, recognized as such, in Spanish times, and with extent and boundaries capable of proof, (as was required by the act of 1824.)

If he had a right to a lot at one place by grant, and pos-



sessed and cultivated ground at another place, the possession is not under the grant, and these two grounds of title, under two different acts of congress, cannot be united to aid each other, as is attempted here—the one to show a confirmation by the act of 1812, and the other to show its extent and its character as a common field lot.

A confirmation by the act of 1816, (evidenced, as in this record, by the tabular statement from the report of the recorder of land titles,) is by the mere force of the act, and is wholly independent of possession, or any other merits in the claimant.

This point is settled in *Hammond v. The Public Schools*, 8 Mo. Rep. 65. That case will show that Madame Lacaisse never did inhabit, cultivate or possess the lot, yet it was hers, by mere force of the act, and without any action or merit on her part.

V. In confirmations of *lots* by the act of 1812, it is conceded on all hands, that they must have been designated and known as *lots* in Spanish times. And I admit, that if a man had a *grant* or *survey* of such a lot, and used a part of it, claiming the whole, his claim to the lot, as described in the grant or survey, is confirmed by the act.

But if a man have no other title than cultivation or possession of a piece of ground contiguous to granted and surveyed lots, I deny that the act confirms to him a lot like those granted and surveyed, in size, shape or boundary. I deny that it confirms to him an inch of land, beyond his actual possession.

The Spanish government knew nothing of a common field lot where Chancellor's claim is now surveyed; and the American government never heard of it until very lately. The *Grande Prairie* was one thing, and the *common field of the Grande Prairie* was another—a small part of the former. That common field was known to both governments. Its out boundaries were surveyed by Souldard, and afterwards, in 1817 or 1818, by Brown, which survey was recognized and adopted by the surveyor general in 1822.

VI. The entire common fields of the Grande Prairie, being well known to both the Spanish and American governments, they having both surveyed its out boundaries and put them on record, and Chancelier's claim not being embraced within that out boundary, it is plain, that whether Chancelier had, or had not, a lot at the place indicated, that place was not within the common field of the Grande Prairie. This court has decided, that what is a *common field lot*, is a question of law for the court; and, *a fortiori*, what is a *common field*, is a question of law. And here the point is settled by both governments—that is, the *common field* which they, by formal survey, have ascertained and declared as such.

Now, Chancelier's concession is older than Duralde's survey, (*Livre Terrien*, No. 2,) and yet is not embraced *by name* in that survey; and the reason is plain: the caption and concluding certificate of that survey showed, that the then government did not recognize the authority of St. Ange and Labuxière, to make the concessions, but did recognize the justice of the claim of the claimants and possessors; and that accordingly, Duralde made the surveys according to the then present rights of the parties, regarding the sales and exchanges that had been made subsequent to the grants.

One of two things, then, must be true; either that Chancelier's grant was abandoned by non-claim and left out of the survey, like Labuxière's grant in the St. Louis Prairie, (see *Hill & Thomas v. Wright*, 3 Mo. Rep. 243,) or, it was surveyed by Duralde, in some other name, as having been sold or exchanged.

The survey of the out boundary of the *Grande Prairie* field is a public survey, and, therefore, less subject than private surveys are, to objections by private persons.

VII. The survey of Chancelier is, at best, a mere private survey, and no better than any private survey with which it conflicts. It was placed where it is, not by any reference to the grant or confirmation, but in pursuance of some oral testimony of cultivation, taken by the surveyor, on the ground,

and that cultivation not made by or for the grantee, but by his son, nearly or quite thirty years after the date of the grant. That cultivation might have been the foundation of a claim by young Chancelier to a confirmation under the act of 1812, to the extent of his actual possession; but, certainly, has no connexion, shown in the record, with his father's grant, nor could it perform the miracle of changing the little spot he cultivated, into a *common field* lot, of two by forty arpens, when no such lot existed there before.

VIII. The survey of the out boundary of the Grande Prairie common field, made by the surveyor general's office here, did but follow the Spanish survey of the same. It was made by our government, to enable it to ascertain and subdivide the public lands, in order that they might be disposed of according to law, whether by sale or by application to beneficent objects. And immediately afterwards, all the land, not covered by New Madrid locations, was subdivided, and the sixteenth section remained for the use of township forty-five, and is only interfered with by these new made common field lots—Chancelier's and others.

IX. To show, further, that the Spanish government never granted a common field lot, or knowingly allowed one to exist at the place where Chancelier's survey is now made, the defendant below gave in evidence the grants to Chauvin and Tayon, for forty by forty arpens (1600 arpens.)

These two tracts cover the same identical land: Chauvin's grant was in 1785, Tayon's in 1786. Tayon's was afterwards renounced and equivalent lands granted to him elsewhere. Chauvin's was confirmed by the board of commissioners, in 1811.

X. I need not dwell here upon what has been advanced by other counsel, that the lots granted to Chancelier and Hervieux were a half mile or more north of this survey, and that this fact is proved beyond question, by tracing upon the township plat, the call of the documents of title given in evidence.

But if the survey must be south of René Kiercereau, out-

side of the common field, as surveyed, and within the grant to Chauvin, still, it is insisted, it is too far east, by nine arpens and thirty-six feet.

XI. The counsel for the defendant in error contents himself with citing only the case of *Page v. Scheibel*, 11 Mo. Rep. 167, as covering this case and closing all way of escape for the defendants below.

I know not how far this court may be disposed to adopt the reasoning and the legal points assumed, *arguendo*, by the learned Judge who gave the opinion of the court in that case. But, with all possible respect, I must indulge the hope, that some important passages in that opinion will be taken by this court with many grains of allowance, when it is settling the titles of our most valuable lands, and laying down rules which others must apply, in order to measure the relative value of those titles, to show their origin, and define the elements of which they are composed. I refer, in particular, to page 186.

*F. M. Haight*, for same.

*H. S. Geyer*, for respondent.

The questions presented by the record in this case, with a single exception, were determined against the plaintiff in error, upon an elaborate argument and full consideration, in the case of *Page v. Scheibel*, 11 Mo. Rep.

In that case, D. D. Page was plaintiff below, claiming under a New Madrid location for Martin Coontz, or his legal representatives. The plaintiff in error, who is the son of D. D. Page, was the defendant below, claiming under the same title. In that case, Scheibel, the defendant below and in error, claimed under a confirmation of a lot of two by forty arpens in the Grande Prairie common fields, to Calvé or his legal representatives. In the case at bar, the plaintiff below, now defendant in error, claimed under a like confirmation of two by forty arpens in the same field, to Chancelier or his representatives.

Both Calvé and Chancelier had grants registered in Livre Terrien No. 1, the calls of which were not proved to embrace

the land in controversy. The report of the recorder of land titles, confirmed by the act of 29th of April, 1816, embraces both claims, referring in each of them to the grant, under the head "concession, warrant or order of survey." The quantity claimed, as stated in each case, is two by forty arpens in St. Louis fields, Big Prairie; the acts of ownership, inhabitation, cultivation and possession, prior to 1803. Under the head "opinion of the recorder," in each case is stated, "confirmed to be surveyed." There was, in each case, an official survey by the United States; that of Calvé being No. 3304, and that of Chancellor No. 1561. These surveys adjoin each other, No. 3304, being on the north. In both cases, the proof of cultivation and possession prior to the 20th of December, 1803, was very full and conclusive.

In respect to the title of Chancellor and his representatives under the confirmation, the same questions were made that have been decided in *Page v. Scheibel*, and upon the decision in that case, the defendant in error relies.

In no instance was a common field established by grant, or its boundaries defined by official authority. Grants of lots were made to individuals as they were required. Not as common field lots, for that name was unknown until after the lands had been cultivated under a common enclosure. The grants were made in tracts or lots of one or more arpens in front by forty in depth; but the grants amounted only to permission to possess and cultivate and as a transfer of title. In some cases, there were spaces in the shape of the granted lots; and in all of them, the common fields were extended from time to time, by the grant or cultivation of additional lots; so that the only boundaries of the common fields, except along the front and rear of the lots, remained indeterminate, until the Governor ceased to make grants, and the inhabitants discontinued cultivation.

The act of the 13th of June, 1812, did not propose to confirm grants only, but to confirm the titles of those who had inhabited, cultivated or possessed a lot prior to the 20th of December, 1803. Permission to settle being presumed by that

act, inhabitation, cultivation or possession prior to 1803, is a title to the lot inhabited, cultivated or possessed.

The action of the recorder of land titles, confirmed by congress, is conclusive upon the United States and every person claiming under them, of the title of Chancellor's representatives to the lot in question, at least, until it shall be proved that the survey, No. 1561, does not include the land cultivated and possessed by Chancellor's representatives. Or, in other words, the report of the recorder and act of April, 1816, confers a complete title upon Chancellor's representatives, to a lot of two by forty arpens in the Grande Prairie; that it was a common field lot, cultivated or possessed as such, prior to 20th of December, 1803, and the survey, No. 1561, being executed in conformity with the confirmation, is evidence of the location and boundaries, which can only be rebutted by proof that the cultivation was not of that lot. When the location was made of the New Madrid certificate, those who claimed to be the representatives of Coontz, knew, or are presumed to have known, that a lot of two by forty arpens to Chancellor's representatives, had been confirmed to be surveyed in the Grande Prairie, and that other confirmed lots were yet to be surveyed there. They knew also, that the surveys were to be made by the United States, and must adjoin the common field lots already surveyed on the north or south; and, therefore, in making the location, they made it subject to future surveys of the confirmed lots.

But, independent of the action of the recorder and congress upon the title, the proof is full and entirely conclusive of the cultivation of a lot of two by forty arpens, precisely at the place where the survey was made, and there, the title is vested by the act of 1812, as well as by the report of the recorder and the act confirming it.

Chancellor and his representatives have, therefore, an unquestionable title to a lot of two by forty arpens, in the Grande Prairie, bounded on the north and south precisely as it appears to be bounded by the survey No. 1561, and it is wholly imma-



terial to the question of title under the confirmation, whether the boundaries correspond with the grant or not: it is the lot possessed and cultivated, and no other, that is confirmed—and if the lot granted is a different one from that cultivated, the lot granted is not confirmed. But it does not appear that the lot cultivated is not the same granted; all that can be said is, that the plaintiff did not prove the identity of the lot granted, with that confirmed; and the defendant gave no evidence to prove that it was not. It may or may not be the same lot; the calls in the grant are not inconsistent with the survey or cultivation,—and with the proof of cultivation, the confirmation by the recorder and the survey, it is presumed, in the absence of any evidence to the contrary, that the lot was cultivated under the grant, and consequently with the boundaries called for.

It appears that a number of the southern lots of the Grande Prairie, commencing with several north of Chancellor's No. 1561, extend nine arpens further east, than those further north; and it was contended, that the survey was erroneous on that account; but it will be seen, that some of the lots immediately north of Chancellor extended the full distance, under the Spanish government, and that by actual survey. The stones and cinders are found at the corners on the eastern boundary, as extended, and the survey No. 1561, conforms to that line.

The court below declared correctly, in holding, that if for several years prior to 20th December, 1803, there were lots of one or more arpens in front, by forty in depth, possessed and cultivated as common field lots, in the Grande Prairie, adjoining those which were granted, the possession and cultivation being in the same manner as of the granted lots, the lots so possessed and cultivated were common field lots within the meaning of the act of 13th June, 1812, although there may have been no written grant or official survey, under the Spanish government; and if Chancellor or his representatives possessed and cultivated such a lot prior to 20th of December, 1803, it was confirmed by the act of 13th of June,

1812, if not abandoned. This is the construction of the act repeatedly given by this court and by the Supreme Court of the United States, in the case of *Strother v. Lucas*, and is now too well settled to be disturbed.

In respect to the report of the recorder, confirmed by the act of 29th of April, 1816, the court below ruled, in conformity with the decisions of this court, that it is a confirmation of a lot of two by forty arpens, in the Grande Prairie common fields, as possessed and cultivated by Chancellor or his representatives prior to the 20th of December, 1803, and that the survey, No. 1561, is evidence of the extent and boundaries of the confirmation, and that the title to the lot so possessed and cultivated was vested in Chancellor's representatives, notwithstanding it might not correspond with the description in the concession.

That the representatives of Martin Coontz could not, by locating a New Madrid certificate, acquire a title to land previously confirmed to another, is the proposition asserted in the fifth instruction given for the plaintiff, and is too clearly according to law to admit of controversy.

All the facts upon which the title under the act of June, 1812, depended, were submitted to the jury, and found by them in favor of the plaintiff below, and that finding is upon evidence not only sufficient but conclusive. The accuracy of survey No. 1561 was submitted as a question of fact for the jury, by the last instruction given by the court on its own motion. That instruction is more favorable to the defendant than it ought to have been, and of that, the plaintiff in error cannot complain. The title under the act of June 13, 1812, is complete without a survey, and as a survey under the order of survey of the land confirmed by the recorder of land titles, it is conclusive against the plaintiff below.

It is unquestionable, that a New Madrid location, however regular, must yield to a title under the act of 1812. The legal title to a common field lot being vested on the 13th of June, 1812, depends upon inhabitation, &c., prior to the 20th of December, 1803; the title is according to the possession,

which, when proved, will prevail against a New Madrid location, or even a patent confirmation subsequent to the 13th of June, 1812. No survey of the confirmed lot is necessary, in order to maintain the title.

In respect to the confirmation by the recorder of land titles, the official survey must be regarded as conclusive against a New Madrid location. The party making the location, did so with full notice that the southern lots in the Grande Prairie fields, extended nine arpens east of the east line of the lots on the north, by the official surveys of the Spanish government; that a number of lots in the Grande Prairie, including that of Chancellor, had been confirmed to be surveyed; that the confirmations were upon possession, which possession was east of survey No. 3304, as has been fully proved at the trial; and if the defendant, or those who located the certificate, did not know the place of cultivation, it was because they did not take the trouble to enquire. They must have known that the lots on the south were extended as far east as the survey; and when the location was made, the order of survey existed, and its execution was intrusted to the officers of the United States, and the location was made subject to that survey, in the same way and with the same effect as when a location is made on a lot confirmed by the act of 1812, with the inhabitation, boundaries and extent remaining to be proved.

The remaining question arises from the descriptions in the deeds under which the plaintiff claimed.

In the deed from George F. Strother and Luke E. Lawless to M. R. Boyce, the land conveyed is described as a tract or piece of land situate in what is called the Grande Prairie, containing  $\frac{1}{2}$  arpent in front by 40 in depth, being part of a larger tract originally granted to Louis Chancellor by the Spanish government.

The deed of Chancellor and others, heirs of Louis Chancellor, conveys to Boyce  $1\frac{1}{2}$  arpens in front by 40 in depth, being the residue of 2 arpens by 40, granted by the Spanish government to Louis Chancellor. The said Chancellor

having, in his lifetime, conveyed  $\frac{1}{2}$  arpent to one Gamache, the said land being situated in the Grande Prairie, west of St. Louis, and described as to boundary, in Livre Terrien, or Spanish records.

*W. L. Williams*, for same.

GAMBLE, Judge, delivered the opinion of the court.

1. In the case of *Page v. Scheibel*, 11 Mo. Rep. 167, the controversy was between Page, claiming under a New Madrid location, made in the name of Martin Coontz, or his legal representatives, and Scheibel, claiming a common field lot in the Grande Prairie common field. The claim to the common field lot was included in the report made to congress by the recorder of land titles, and was confirmed by act of congress of the 29th of April, 1816. The report of the recorder, which was in a tabular form, referred, in one column, to the provincial land book or Livre Terrien, for the concession of the land which had been made to Joseph Calvé, and in another column, stated that the lot had been cultivated prior to 1803. In one column it was stated, that there was no plat of the land, and in the last column, containing his opinion, are the words, "confirmed to be surveyed." The survey of the tract under this confirmation was made adjoining that now in controversy.

The present suit is between Page, claiming under the same New Madrid location, and Harrison, claiming under the confirmation of a common field lot made by the act of 1816, upon the same report of the recorder, in the same terms, in favor of Chancellor's representatives. In this, as in the other case, evidence was given to prove that the lot had been cultivated prior to 1803.

So far as the questions presented in the present case have been decided in *Page v. Scheibel*, they will not now be reconsidered, or the decision disturbed. The case was fully presented to the court and the decision given with care and deliberation; and unless, under such circumstances, there was in the decision some error that we regarded as very manifest, we would not feel disposed to overrule it. If, in the argument or reasons employed by the Judge who gave the opinion, there

should be found parts which are open to objection, yet the conclusions of the court, upon the questions arising in the cause and decided, will not lose their force as authority, by a criticism of the argument, even if successful.

Before an examination of the questions in this cause, it is proper that the mind be, in some degree, possessed of a history of the titles under consideration.

The act of congress of the 13th of June, 1812, after confirming the rights, titles and claims of the inhabitants of the several Spanish towns and villages in Missouri to their town lots, out lots and common field lots, which had been inhabited, cultivated or possessed prior to the 20th of December, 1803, invested the recorder of land titles, by its 8th section, with the powers previously possessed by the commissioners, in relation to claims which had been filed and not decided upon by the commissioners, as well as claims by actual settlers, which the act allowed to be filed before him. His powers were, however, limited in the section, by denying him the right to confirm claims, and making his decisions subject to revision by congress. He was required to make a report to the commissioner of the general land office, of the claims, with the substance of the evidence in support of them, and with his opinion thereon, which was to be laid before congress.

The report made by the recorder upon claims, which, in his opinion, ought to be confirmed, had one column for reference to the concession, warrant or order of survey, another for reference to the survey, another for the name of the claimant, another for the quantity claimed, another for the situation of the property, another for acts of ownership over the property, and the last for the opinion of the recorder. In the case now before us, *Livre Terrien*, No. 1, page 9, is referred to for the concession; under the head of survey, it is stated, that the claim has not been platted; the claimants are Chancelier's representatives; the quantity, 2 by 40 arpens; situation, an out lot in the fields of the Big Prairie, St. Louis; the acts of ownership, possession and cultivation prior to 1803; and the

opinion of the recorder is, that the claim ought to be confirmed for 80 arpens, to be surveyed.

The claims thus reported, were confirmed, by the 2d section of the act of April 29, 1816.

At the period that the government acted on these claims, and confirmed that now under consideration, there was no opposing claim to the land now in controversy, and not only by the terms of the confirmation, but by the commands of the law governing the surveyor, it was his duty to survey the land embraced by the claim, as it was confirmed.

The survey of Coontz' New Madrid claim was not made until July, 1818.

If the land in controversy is properly included within the survey made under the confirmation, then the claimant under the New Madrid certificate, can have no title to it, for it is covered by a specific grant by congress, made before his title attached to it. Accordingly, the principal questions disputed in the court below and discussed here, relate to the proper location of the confirmation. It was denied, as a fact, that the common field extended as far south as this land, and if it did, that any of the lots projected to the east of its general boundary, so as to include the land in controversy. For the purpose of sustaining this view of the facts, it was insisted as a matter of law, "that in order to constitute an out lot or common field lot, the tract must have been recognized as such lot under the Spanish government, and must have been appurtenant to the village of St. Louis, so as to be subject to the authorities of the village, in the same manner as the others which were without dispute, common field lots." It was next insisted, "that if the land in controversy was not included in the official surveys of the range of common field lots of the Grande Prairie, under the Spanish government, and if there were Spanish surveys of the several ranges of the common field lots belonging to St. Louis, which were recorded and remained among the archives of the country, and if the town of St. Louis had not exercised control over the tract in question, then it was not



a common field lot, within the meaning of the act of June 13th, 1812."

2. It was held in *Page v. Scheibel*, that the titles of persons claiming common field lots, under the act of 1812, do not depend upon their being able to produce either concessions or surveys of the land claimed. The court says: "These permissions, (permissions to settle) it is probable, were most generally, if not always, in writing, and accompanied by a survey made by an officer selected and authorized by the government. But the title of the claimants under this government does not depend upon the existence or proof of any such documents."

If neither a concession or survey is a requisite to the title when confirmed by the act of congress, it is difficult to understand what other evidence of recognition, under the Spanish government, must be given by the claimant, in order to show that the land was a common field lot. It seems to be thought necessary that the confirmer should show that the lot was, in some manner, subject to the village authorities, in order to establish the fact, that it was a common field lot. If the syndics of the village would possess any authority over the lot, or its owner, by reason of its being a common field lot, certainly it is not necessary that the owner should give any evidence of the exercise of such authority, in order to establish the fact, that his property is of the description known as a common field lot.

3. Whether it is a lot of that description, or not, will be determined by its being one of a series of lots in the vicinity of the village, occupied and cultivated by the inhabitants of the village in a common field. The first instruction given by the court, upon its own motion, properly describes a common field lot, with two unimportant errors. In that instruction, it is mentioned, that the ranges of such lots were protected by a common fence in front, and that strips of uncultivated land were left between the cultivated lots, marking their boundaries. In the course of litigation, that has arisen in relation to this description of property, it has been shown that there were com-

mon fields which had no fence upon any of their lines ; and the strips of land left uncultivated between the different lots cultivated, were, by no means, generally found in such fields. In other respects, the description of such lots given in the instruction, is correct.

4. In determining whether the lot claimed by Chancellor was a common field lot, within the meaning of the act of June, 1812, too much importance was attempted to be given to Spanish surveys of the common fields. The evidence given in this case abundantly shows, that a tract of country was not made a common field under the Spanish government, by running an exterior boundary, and then subdividing the contents into lots, but the lots were granted or surveyed in succession, each being bounded on a lot previously granted, and so the common field was capable of indefinite extension, and each survey, when made, was the survey of a single lot. There could not be, under such circumstances, any survey of a boundary of the common field, which would show more than that, at the date of the survey, the lot granted had a certain extent, and as it would not be any limitation upon the power of the Lieutenant Governor to grant, so it would not afford any evidence that he had not subsequently granted lots or permitted them to be occupied. In fact, without being accompanied with some order directing such survey to be made, it is very questionable whether it would be any evidence against an individual claiming land which ought to have been embraced within it.

The fifth instruction given by the court, on its own motion, referred to the jury the question of fact, whether the lot confirmed to Chancellor's representatives was properly located by the United States survey, and directed them that, if they found that it ought not to have been projected to the east of the eastern line of the Picard lot, which was north of it, they should find for the defendant. This instruction substantially embraced the points contained in the fifth and sixth instructions asked by the defendant.

5. The questions presented upon some of the deeds under

which the plaintiff claimed, made by part of the representatives of Chancelier, who are named in the first instruction of the defendant, are not without difficulty. The grantors describe the land they conveyed as "1½ arpens, being 60 arpens, residue of 2 by 40 arpens, granted by the Spanish government to Louis Chancelier, the said Louis Chancelier having, in his lifetime, conveyed ½ arpent to one Gamache, the said land being situated in the Grande Prairie, west of the city of St. Louis, and described, as to boundaries, in the Livre Terrien, or Spanish record." Evidence was given for the purpose of showing that the tract granted to Chancelier in Livre Terrien, would not, if properly located, include that now in controversy. It appeared that the grant was made on the 20th of January, 1767, to Chancelier, for 2 by 40 arpens in the Grande Prairie, bounded on one side by Jean Hervieux, and on the other by——. The concession to Hervieux is dated 30th December, 1766, and is for 2 arpens by 40, bounded on one side by Louis Chancelier, and on the other by ——. These two lots had one line common to them, and there was no boundary called for on the other side of either; so that all that could be determined by their calls was, that they were to adjoin each other, but which is to the north or south of the other, does not appear. There did not appear to have been any Spanish survey locating these grants, nor any acts of the grantee, Chancelier, claiming to hold land under his grant, at any place other than that where the grant is now located. Three years after the date of the concession to Chancelier, a concession was made to Condé for a tract of 2 by 40 arpens, bounded on one side by Hervieux, and on the other by Deshêtres. There appears to have been no concession to Deshêtres. It is evident that the calls in Condé's concession do not assist in locating Chancelier, for the concession to Hervieux may be either north or south of Chancelier, and so, Condé's grant, calling for Hervieux, may just as well be answered, if Chancelier is at the south part of the common field, as if he were at the north. But, without stopping to examine the evidence in detail, it is sufficient to say

that, in the absence of any call in the grant that can fix its location, and without any survey fixing it at a place different from that now claimed, and without any claim set up under the grant at a different place, there is nothing to authorize a jury in finding that the grant was for different land.

On the other hand, the confirmation refers to the concession as contained in Livre Terrien, and declares that the land was cultivated prior to 1803, and this, in the absence of any calls in the grant that would separate it from the possession, must be understood as connecting the grant with the possession, and with all the authority of an act of congress, locating the grant upon the land cultivated and possessed prior to 1803. In *Page v. Scheibel*, it is distinctly asserted, that the confirmation of the claim, as reported by the recorder, is a confirmation of the title to the land possessed and cultivated, and that the statement of the possession and cultivation is the material and controlling description of the land embraced by the confirmation. The language of the court is, "The assertion of the recorder that the lot recommended for confirmation was occupied or cultivated by the claimant, constitutes a material part of the description of the premises, and must be taken in connection with the metes and bounds given in the concession. If there be a conflict between the two, the latter cannot control." In the present case, we have no call in the grant but the land of Hervieux, and the land of Hervieux is not located either by any calls in his grant, or by any survey, or by any acts of ownership under his grant. The grant, then, of Chancellor, was without any location, and without any calls that would interfere with its being located upon any land in the Grande Prairie common field, which he might have claimed and possessed under it.

After the act of congress was passed, which confirmed the claim and located the previously floating concession upon the land possessed and cultivated, the deeds were made by Chancellor's representatives, which are now considered as conveying other land than that confirmed, upon the supposition that the

concession was for other land. These deeds refer to Livre Terrien for the boundaries of the land conveyed, but being made at a time when the action of the government had located the concession upon the land possessed and cultivated, and there being no call in the concession inconsistent with such location, it must be understood that the grantors and grantees in the deeds were contracting about the land upon which the concession had been located; and when we find the only concession in Livre Terrien, made to Chancelier, thus located, we have no difficulty in saying, that the deeds would pass the land on which the concession, by the consent of the government and the claimant, had been located.

Although the United States survey of the land confirmed was made after these deeds were executed, it will serve to show the understanding of the parties—both the government and the confirmees—of the meaning and operation of the confirmation. It purports to be a survey of a tract of 80 arpens, “situate in the Grande Prairie common fields of St. Louis,” and as “being the tract of 2 by 40 arpens granted to Louis Chancelier on the 20th of January, 1767, by Louis St. Ange de Bellerive, commandant of the post of St. Louis, in the Spanish province of Upper Louisiana, (see Livre Terrien, No. 1, page 9,) and confirmed to Chancelier’s representatives by the second section of the act of congress, of the 29th of April, 1816, confirming all claims embraced in the report of the recorder of land titles,” &c. This survey is of the land possessed and cultivated, according to the testimony in the case, and it is apparent that it was made upon the understanding that the concession in Livre Terrien was located upon the same land.

The Court of Common Pleas properly refused the first instruction asked by defendant, which relates to these deeds, and although the fourth instruction, given by the court upon its own motion, is involved and rather confused, it contains all that was necessary to be said to the jury upon this question.

Upon the whole case, without any more detailed examination

of the points presented in the instructions, it is the opinion of the court, that there is no error requiring a reversal of the judgment of the court, and with the concurrence of the other Judges, it is affirmed.

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CRAVENS, Appellant, *vs.* PETTIT, Respondent.

*Appeal from Wayne Circuit Court.*

On the 23d day of February, 1846, the appellant, Cravens, filed his bill in chancery, alleging that Pettit, the respondent, claimed a right to a confirmation, prior to the year 1832, of a tract of land containing about 640 acres, lying in the counties of Madison and Wayne, in this state; which tract was generally known as the "Cedar Cabin," but which claim had been *rejected* by the board of commissioners; that *after* the rejection of said claim, the appellant, Cravens, purchased from the said Pettit, for the sum of four hundred dollars, the right, title and interest in the said tract of land, of him, the said Pettit; that no deed passed for said tract of land between the parties, at the time of the purchase of said claim, but the respondent, Pettit, was to use his best exertions to procure a confirmation for the benefit of Cravens, when he, Pettit, was to execute and deliver a deed to Cravens; that said Cravens immediately entered on said land and made valuable improvements thereon, and entered, at the proper land office, about 320 acres of said land. That after said sale to the appellant, Pettit procured a confirmation in his own name, of said "Cedar Cabin" tract, and claims to own the same, and refuses to make said deed to Cravens, and has actually offered the same for sale, and has, moreover, in consequence of said entries by Cravens, obtained a float from the land office for about 160 acres, which the said Cravens claims as his, but which defendant insists on keeping for his own use. The bill prays for a decree, compelling Pettit



to convey said land and float to him, (Cravens,) and for an injunction prohibiting the sale of said property by Pettit.

To this bill the defendant demurred, and the appellant joined in demurrer, and on the 4th of May, 1846, the appellant, Cravens, filed an amended bill, and the respondent withdrew his demurrer. The amended bill is substantially the same as the original, except that it is alleged in the amended bill, that one Gray purchased the "Cedar Cabin" with Cravens, and that Cravens actually paid the four hundred dollars to Pettit, and was put in possession of said tract by said Pettit, and made about two thousand dollars worth of improvements on said tract, with the knowledge and consent of said Pettit; and that he (Cravens,) was entirely ignorant of Pettit's procuring the confirmation, until a short time before the filing of his bill.

Pettit, the respondent, on the 15th day of September, 1847, filed his answer, admitting the sale to the appellant (Cravens,) of the *cabin*, and that only; expressly denying that he sold his claim to the *tract of land*; also admitting, that, after the sale to Cravens, he procured a confirmation of said claim for his own use and benefit, and not for the appellant, Cravens; and expressly denying that he, in any manner, agreed or bound himself to procure said confirmation for Cravens. The answer alleges, that the improvements were made on 160 acres of said tract, patents for which were issued to Cravens before the confirmation, and to which 160 acres Pettit admits that Cravens is entitled. A replication was filed to the answer. On the application of the respondent, Pettit, an order was made by the court, to produce the writing made and executed by said Pettit for the "Cedar Cabin," when the same was sold to the appellant, Cravens, which order was complied with, and the written instrument, in the following words, was read in evidence by the respondent:

"John L. Pettit resigns all his right, and title and interest to the Cedar Cabin, to John Cravens and John W. Gray.

March 5th, 1832.

WM. C. PERSON."

This case was set for hearing on the pleadings and proofs,

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and the appellant asked for a jury to try the issue of fact, which was refused by the court, and to which refusal the appellant excepted. The court below, after hearing the evidence offered by the parties, dismissed the bill; the complainant excepted, tendered his bill of exceptions, and prayed an appeal to the Supreme Court, which was granted.

*Blennerhassett & Shreve*, for appellant.

*J. D. Cook*, for respondent.

RYLAND, Judge, delivered the opinion of the court.

In looking into the evidence preserved by the bill of exceptions, in this case, there is ample proof, establishing beyond a doubt, that the "Cedar Cabin" was the name by which the tract of land was known to the parties in this suit, and, also, proving the fact, that under that name the defendant, Pettit, sold the tract of land in controversy, to the complainant and one John W. Gray.

The board of commissioners, it appears, had rejected the application of Pettit for a confirmation of this tract; that after this rejection he sold to complainant and Gray for the sum of four hundred dollars; that Gray released his interest in the purchase to Cravens; that Gray paid nothing, and Cravens paid the consideration money; that at the time of the sale the defendant, Pettit, made a writing, of which the following is a copy, viz:

"John L. Pettit resigns all his right, and title and interest to the Cedar Cabin, to John Cravens and John W. Gray.

March 5th, 1832.

WM. C. PERSON."

After this transaction Pettit moved away, and Cravens moved on and took possession, made valuable improvements, and before the claim of Pettit was confirmed under the act of congress, 1836, Cravens had entered 160 acres of land, included in this claim, as afterwards confirmed; also, had entered 160 acres more, after the confirmation. The entry, after the confirmation, must yield to it. The entry made prior thereto being good and valid, a "float" for 160 acres, on account of this entry, was granted to Pettit.

It is difficult to see upon what ground the court below dismissed this bill. It is a mere trick for the defendant now to assert that he sold the "Cedar Cabin," but not the tract of land. At the time of the sale, it was in proof, that there were from ten to twenty acres of improvement and an old "Cedar Cabin" fifteen or sixteen years old, worth from fifteen to twenty dollars. Cravens paid Pettit for the Cedar Cabin four hundred dollars. Now, it is hard to make one believe that the old log house, worth fifteen or twenty dollars, was the thing bought by Cravens and sold by Pettit. No man could be found simple enough to *pay four hundred dollars* for an old worthless log house on the St. Francis river in 1832, though it was made of *cedar logs*. No man would "resign" all his "right, and title and interest," in writing, to such a worthless commodity. It becomes obvious, at the first blush, that this old cabin was not the thing sold; it was the interest, title, and right to the "Cedar Cabin" tract of land. From the evidence in this case, there is no room to doubt this. The decree, then, dismissing the complainant's bill, is erroneous, and must be reversed, and this cause remanded to the Circuit Court, with directions to enter a decree for the complainant, vesting all the right, title, claim and interest under the confirmation, which Pettit obtained to the "Cedar Cabin" tract of land, mentioned in the bill of the said complainant, taking pains to ascertain it from the proof in the cause; also, with directions to take an account of the value of the "float" for 160 acres, at the time it was issued to Pettit, and vest the title by the decree in the complainant and his heirs; and that the money, the value of the "float," be paid to complainant, and that the defendant pay all the costs of this suit.

The other Judges concur herein.

NIEDELET, Respondent, vs. WALES *et al.*, Appellants.

1. It is no defence to an action for rent under an express covenant, that a rise in the river rendered a part of the leasehold premises untenable. When the defendant files an offset for damages sustained by such a rise, it is properly stricken out, on motion.

*Appeal from St. Louis Court of Common Pleas.*

*Knox & Kellogg*, for appellants, contended :

1. That the motion to strike out should have been overruled. If the answer was no defence, the objection should have been taken either by demurrer or by motion for judgment for want of answer. *Laws of 1849*, p. 80, sec. 9.

2. That the defendants should have been allowed the loss sustained by them, in consequence of the untenable condition of the premises. *Chitty on Contracts*, 7th Am. ed. p. 338, and cases there cited.

*Henry N. Hart*, for respondent, contended, that the offset was properly stricken out. The covenant to pay rent was absolute. No exception is made in the lease for a rise in the river, and therefore, the defendant cannot escape from his liability. *Linn v. Ross*, 10 Ohio, 412. *Fowler v. Bott*, 6 Mass. 67. *Phillips v. Stevens*, 16 Mass. 238. 3 Kent, 465-7. *Redding v. Hall*, 1 Bibb, 536. 12 Mo. 209. *Sutton v. Temple*, 12 Mees. & Wels. 52.

GAMBLE, Judge, delivered the opinion of the court.

Niedelet leased to the defendant a warehouse, on Water street, in St. Louis, for three years from the 16th of February, 1850, the rent payable monthly, under an express covenant. He sued them for the rent due in June, July and August of that year. They answered, that the premises, during the months of May, June and July, became untenable, by reason of water filling the cellar and first story of the house, and by reason of deposits of sand, mud and filth, by which they were put to great trouble and expense in removing their goods and restoring the premises to a tenable condition, of which expense they fur-

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nished a bill of items, and claim the amount of the plaintiff as a set-off.

A motion was made to strike out the answer, which was sustained, and judgment given for the plaintiff. The defendants appeal to this court, and ask the reversal of the judgment, chiefly on the ground that their answer was disposed of by a proceeding too summary, being by motion, instead of by demurrer.

1. The whole defence in this answer runs back to some accident, such as an overflow of the river, which occurred during the term, by which the premises were rendered untenable for a short period, and by which the tenant was subjected to loss and expense. It is true, that the form in which the defence is set up, is by way of offset, but that will not prevent an examination of the case, out of which the alleged offset grows. When that case is examined, it is not in itself a defence, nor are the consequences stated in the answer any defence, although called a set-off. If there was any appearance of a defence in the answer, as a set-off, it might be proper that the objection should be considered in a more solemn form, than upon a motion to strike out the answer. But this is not a matter of much importance to a defendant, for either proceeding produces the same result, and the court would give leave to amend the answer, if such leave was proper, as readily in one proceeding as the other.

Let the judgment be affirmed.

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KELLY, Appellant, *vs.* HOGAN, Respondent.

1. It is erroneous to take judgment by default against a defendant, where there has been a judgment of non-suit against the plaintiff which the record does not show to have been ever set aside.

*Appeal from St. Louis Law Commissioner's Court.*

H. N. Hart, for appellant.

RYLAND, Judge, delivered the opinion of the court.

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The plaintiff sued the defendant in the Law Commissioner's Court. The defendant answered ; a trial was had, and judgment given for the plaintiff. The defendant moved for a new trial, which was granted, and the cause again set for trial. On the trial day the plaintiff failed to appear, and was non-suited. A motion was afterwards made to set aside the non-suit, but the record no where shows what was the fate of this motion ; however, in the course of time, the plaintiff obtained judgment against the defendant by default, without any notice of this non-suit having been set aside. The defendant then moved to set this judgment by default aside, his motion was overruled, and he excepts and brings the case here.

1. It is, in our opinion, erroneous to take judgment by default against the defendant, in any case, where there appears upon the record a judgment of non-suit, still remaining in force. This case comes from the Law Commissioner's Court, being a daily court, always open. Nevertheless, when a party is non-suited, or a judgment by default obtained, and the non-suit or default is afterwards set aside, the commissioner should always have evidence that the plaintiff or defendant, as the case may be, has been duly notified of the state of the case, before a second trial is had, or a second non-suit or judgment by default taken by either party, or against either party.

For rendering judgment by default against the defendant in this case, under the circumstances appearing on the record, the judgment below is reversed, and the cause remanded for further proceedings, the other Judges concurring herein.

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CHOUTEAU & VALLE, Defendants in Error, vs. STEAMBOAT ST. ANTHONY, Plaintiff in Error.

1. Although a steamboat may be liable as a common carrier, for packages of money, yet, there can be no such liability, if the service was to have been performed without hire.
2. The act of a captain of a boat, in taking money for transportation, is not *prima facie* evidence of the liability of the boat.



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3. To make the boat, or its owners liable, in such a case, it must be shown that it was within the scope of the usual employment and services of the boat, for the captain to carry packages of money for hire, on account of the owners. If the captain carries them on his own account and responsibility, the owners are not liable.

*Error to St. Louis Court of Common Pleas.*

*E. Bates*, for plaintiff in error.

I. The first paragraph of the plaintiff's instruction is erroneous, because it assumes that the boat was necessarily liable, if the captain undertook to carry and deliver the bank notes and failed to deliver a part of them, although the petition does not charge any consideration, and the testimony does not show any.

II. The second paragraph is erroneous :

1. Because it announces a general proposition of law, no more applicable to this case than to any other.

2. Because it assumes, that the captain or clerk of a boat can bind the boat, by the simple act of receiving for transportation any kind of packages, without any reference to the character of the packages, or the nature of the business in which the boat is engaged.

3. Because it assumes that the bare delivery of a package to the captain or clerk makes a contract of affreightment between the deliverer of the article and the boat.

III. The last paragraph of plaintiff's instruction is erroneous:

1. For reasons above alleged, as to the second paragraph.

2. It leaves to the jury the determination of the question of law, what officers of the boat are *authorized officers*, so as to bind the boat, by the simple act of receiving a package for transportation. But the main objection is, that the court below refused the third and fourth instructions moved by defendant below.

IV. By refusing the *third* instruction, the court affirms, as a legal proposition, that the boat is liable upon the implication of a contract with its officer, in a matter in which the boat had no interest, and could not receive profit; the act to be done being a mere courtesy, not to be paid for. A party

may bind himself by any contract that he chooses to make, if it be lawful, and infringe not upon the rights of others. But an implied contract is always based upon a consideration, and inferred from it; so that, without consideration, there can be no implied contract.

V. By the refusal of the defendant's fourth instruction, the court below affirms as law, that the boat is liable for the *crimes* of its officers, as well as for the imperfect and negligent discharge of their duties. This court has decided otherwise. 10 Mo. Rep. 135, *Price v. Thornton*.

VI. The petition sets forth a special contract, made by the plaintiff with Captain Montfort, and the only breach alleged is, the non-delivery of the article agreed to be conveyed. And without any *proof* of such a contract, and with proof that there was no consideration, the Court of Common Pleas holds the boat liable for both the courtesies and the crimes of its captain.

*C. B. Lord*, for defendant in error.

I. The instructions given by the court below contain a correct exposition of the law applicable to the facts of this case, as laid down by this court. *Chouteau & Valle v. Steamboat St. Anthony*, 11 Mo. page 226; same case, 12 Mo. 389.

II. The two instructions asked for by the appellants and refused, were very properly refused. There was no evidence on which to base the instructions. *Vaulx v. Campbell*, 8 Mo. 224.

The boat is liable, unless there was an express stipulation, that she should not be liable; or, in other words, a *special contract*. Such special contract, being an exception to the general rule, must be strictly proved. *Hollister v. Nowlen*, 19 Wend. N. Y. Rep. 234.

It has been held that the carrier could not restrict his liability, even by a special contract; but, however this may be, the carrier, who attempts to limit his liability, will be held to *strict proof* of the contract so limiting it. *Nicholson v. Willan*, 5 East. 513. Angell on the Law of Carriers, 158, 221, 222.

But there was no evidence of any contract limiting the re-

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sponsibility of the carrier. What Capt. Montfort *considered* about the matter, after the package was lost, can have no influence here, even if he does not pretend to say that Chouteau & Valle understood any such thing as that it was to be carried out of courtesy.

If, by the latter part of the second instruction refused, it is intended to assert, that the boat was not liable, because the money was lost by the theft or embezzlement of the captain or clerk, we say that such proposition is not law. Story on Bail. 319, sec. 470. Angell on the Law of Carriers, sec. 148, 149. Livermore on Agency, 358.

The authorities all agree that the carrier is liable for all losses that do not fall within the excepted cases, of the act of God and public enemies. Surely, he is liable, if he steal the goods, or if his agent steal or embezzle them. Story on Bail. sec. 448, case there cited. 2 Kent, 598. 10 John. Rep. 1. Angell, sec. 148.

The instruction, under the evidence, put the case properly before the jury, and this court will not disturb the finding. 13 Mo. 286, 465, 507.

That owners are liable when money was abstracted by their agents, who had it in charge, and that it applies to carriers by water as well as by land. 4 N. H. 304. 6 Johns. 170. 8 S. & Rawle, 533. 10 Johns. 1. 1 Dev. & Bat. 273. 1 Conn. 487. 11 Pick. 41. 5 Day, 415. 2 Ver. 92.

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding begun by the plaintiff against the defendant, for an alleged breach of a contract, by which the defendant stipulated to carry from St. Louis and deliver at Pell's Landing, in Illinois, the sum of \$572 in bank notes. The statement charged, that the said sum in bank notes was delivered on board said boat, in a sealed package, to the clerk, in pursuance to said agreement, and that a portion of the said sum was never delivered. No consideration was alleged in the contract for the transportation of the package. The delivery of the package to the clerk of the boat was proved, and also

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the abstracting of a portion of the money, amounting to \$420. The captain of the boat testified, that no compensation for carrying the package was expected or received by him; that packages of money were usually carried for the customers of the boat as a courtesy; that no compensation is charged, unless there is a bill of lading; that he had been a captain for seventeen years and had carried a half million of dollars, but never charged hire, unless there was a bill of lading. It was not customary to carry money for strangers without compensation. Two other captains of boats were examined as witnesses, in relation to the custom of carrying packages of money. The amount of their evidence was, that, as a matter of policy, they did not charge customers of the boat. Strangers were charged. Receipts are given where there is a stipulated price. The patronage of those was expected, for whom money was gratuitously carried. The impression was, that there was a right to charge, whether receipts were given or not. There was no evidence that there was any receipt or bill of lading for the money in controversy. On the supposition that the boat was liable, there was ample evidence to establish her liability. There was a verdict for the plaintiff for the sum claimed, and judgment, upon which this writ of error is sued out. The following instructions were given by the court:

“If the jury believe from the evidence, that the defendant, by its captain, undertook to carry and deliver the bank notes, as stated in the complaint, and that the said bank notes, or a part of said bank notes, were not delivered as agreed, then, the plaintiffs are entitled to recover, unless the defendant has proved to the satisfaction of the jury, that it was the general custom of the trade for boats not to carry money, or money packages, or that it was the particular custom of the defendant not to carry packages of money, which custom was known to the plaintiffs, and for the captain to carry money or money packages, not on account of the boat, but on account of himself alone.”

“That the captain or clerk of a boat, in receiving articles

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or packages for transportation, is presumed to contract for the boat, and the boat will be bound for such contract of affreightment, unless it is proved that it is the general custom of the trade, or the particular custom of the boat in question, for the captain or clerk to make an individual contract for himself alone, and not for the boat, to carry the articles or packages in question, which particular custom is known to the other contracting party."

"If the jury find from the evidence, that it was the general custom of the trade, for boats not to carry money packages, or that it was the particular custom of the defendant, for the captain to make individual contracts for himself and not for the boat, to carry packages of money, and that such particular custom of the defendant was known to the plaintiffs, then they will find for the defendants."

"If the jury find for the plaintiffs, they will assess the damages at the amount of money or bank notes which were put on the boat and not delivered, with interest on the money so withheld, from the time when the same should have been delivered."

"If the package was delivered to an authorized officer of the boat, for transportation and delivery, and received by said officer for said purpose, then there was an implied contract of affreightment."

The following instructions, asked by the defendant, were given by the court :

"1. To charge the boat in this case, it must be proved to the satisfaction of the jury, that there was a contract of affreightment, by which the boat was bound to carry and deliver the money mentioned in the declaration, and Chouteau & Valle were bound to pay freight on the same."

"2. Such contract may be proved either by direct evidence, or by circumstances, from which the jury may infer the contract."

The following instructions, asked by the defendant, were refused by the court :

“3. If the jury believe from the evidence, that at the time the letter was delivered on board of the boat at St. Louis, both parties considered the carrying of the letter a mere act of courtesy, not to be paid for, then the plaintiff is not entitled to recover.”

“4. If the jury believe from the evidence, that the letter was to be carried as a matter of courtesy, and that the captain or clerk stole a part of the money from the letter, the commission of that crime does not make the boat liable.”

1. There is no doubt that a steamboat may be liable as a common carrier, for packages of money. It is equally well settled, that no person is a common carrier, in the sense of the law, who performs services without hire. If no hire is to be given for services, in relation to the property of others, the person performing them may become liable as bailee, but his obligations are very different from those of a common carrier. It is not necessary that the compensation should be a fixed sum or agreed upon; the owner of the property will be liable on a *quantum meruit*, for services rendered by a common carrier. Nor is it necessary that the thing should be entered on the freight list, or that the contract be verified by a written contract, though the omission of these circumstances may have considerable weight in such a controversy as the present, in determining whether the owners of the boat are liable as common carriers, or whether the responsibility of the contract rested on the captain alone, as the special bailee of the owner of the money.

2. When this case was formerly here, 11 Mo. Rep., the law with regard to the liability of steamboats, as common carriers of packages of bank notes, was correctly stated; but the inference deduced from it, that the act of the captain, in taking the money for transportation, was *prima facie* evidence of the liability of the boat, we do not think is warranted by the authorities. All the cases that have been consulted relative to this question, while they maintain that a boat may be liable as a common carrier for carrying bills, yet hold, that it must be



the usage to carry them for hire, or that it was the known usage of the trade that the boat should so carry them. Neither the weight nor bulk of packages of bank notes requires the accommodation of a steamboat, nor are they objects of freight to warrant the expense of building them. The employment of a boat may be the transportation of passengers only, or any particular commodity, or of passengers and merchandize. When a boat has a particular trade in which she is employed, her agents cannot impose liabilities on her owners, by undertaking to transport articles of a nature entirely different from those which she has been accustomed to carry, and the carriage of which is attended with greater risk and responsibility. No one would maintain that the owner of a ferry, whose ordinary business is to carry passengers and their baggage, would be liable for money entrusted to his boatman, without the knowledge of the owner, and without any compensation to him. Nor would a carrier by wagon be liable for money entrusted to his driver, to be delivered to another, without the consent of the owner of the wagon, although the driver might receive a compensation for his services. The case of *Sheldon v. Robinson*, 7 N. H., maintains, that the driver of a stage coach, whose proprietors were common carriers of passengers for hire, did not, by carrying packages of money and bank bills, for hire, which he received on his own account, become himself responsible as a common carrier, but was only bailee for hire and subject to the liability of that relation. This must be on the ground, that, in receiving the money, he did not act as agent for the proprietors, and that they were not responsible for his acts. The transportation of passengers, or of merchandize, or of both, does not necessarily imply, that the owners hold themselves out as common carriers of bank bills. The indemnity for the risk in carrying notes must be a sum sufficient to cover the guaranty and insurance of such an undertaking. The door that would be open for collusion, if sealed packages were received, taking the sum as stated by the party delivering it as correct, would place the fortunes of boat owners at the mercy

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of those whose depravity would prompt them to the commission of fraud. The case of *Allen v. Sewall*, 2 Wend., decided in the Supreme Court of New York, was placed upon the ground, that it was the usage of boats to carry packages of bank bills, and though the avails of such a trade were a perquisite to the captains, yet, they were regarded as a part of their compensation paid to them, and so a profit to the owners. This case was reversed in the Court of Errors, 6 Wend., and although something was said in relation to the fact, that the owners were incorporated, only for the purpose of carrying goods, wares and merchandize, and that bank notes were, therefore, not among the objects for whose transportation the company was incorporated yet, it is obvious, that the determination rested mainly on general principles, and that the judgment would have been the same had the charter been out of the way. And so it appeared to Judge Story, who, in the case of *The Citizens' Company v. The Nantucket Steamboat Company*, 2 Story, C. C. Rep., says : "If I were compelled to choose between the relative authority of these decisions, upon the ground of the reasoning contained therein, I should certainly have deemed that of the Court of Errors the best founded in the principles of the law. The reasoning of the court below, in that case, seems to me to have been founded mainly upon an assumption of the very point in dispute, that is, whether the owners of the steamboat were common carriers for hire ; for no one can well doubt, that they were not liable therefor, if the ordinary employment of the steamboat, on account of the owners, was confined to passengers and common merchandize for hire, and that the carriage of money was a personal perquisite of the master, upon his sole account, and he received the same and pay therefor, not by their authority, or as a part of their business, or by their command, but simply at his own personal risk as special bailee."

3 In the case under consideration, the captain of the boat testifies, that he carried the package as an act of courtesy ; that no pay was expected or received by him. The evidence of the

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Dallam v. Bowman.

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clerk going to establish the custom of boats to carry bank bills for hire, we cannot think sufficient to impose upon the boat owners the liabilities of common carriers. Customers and friends were not charged. Hire was taken from strangers, but, on whose account, it does not appear. We are ignorant whether it was a perquisite to the officers, or credited to the owners of the boat. As to this particular boat, the captain testifies that no charge was ever made, unless a receipt was given for the package. It should be shown that the captain held himself out as agent for the boat, in undertaking to carry bank bills, as being within the usual scope of the employment and services of the boat; and that the owners of the boat knew that the hire was on their account, for if it was taken on his own account, and on his own responsibility, they were not liable. Judge Ryland concurring, the judgment will be reversed—Judge Gamble not sitting.

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DALLAM, Appellant, vs. BOWMAN, Respondent.

1. A sheriff's sale under execution may be shown to be collusive or fraudulent, and that there was a secret reservation of a trust in favor of the defendant, with the consent of the purchaser.
2. Courts of original jurisdiction should be liberal in allowing amendments to pleadings in furtherance of justice; but the Supreme Court is averse to interfering with their exercise of discretion in such matters.

*Appeal from St. Louis Court of Common Pleas.*

As this case was not decided upon its merits, it is not thought necessary or useful to insert a statement of the facts, or the briefs of counsel.

It was argued by Messrs. *Glover & Campbell* and *R. M. Field*, for appellants, and *Todd & Krum* and *E. Bates*, for respondent.

SCOTT, Judge, delivered the opinion of the court.

It is not the purpose of the court to give any judgment on the merits of the present controversy, as we are of the opinion

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that they are not properly before us. Our views of this subject are now given, that the plaintiff may not be delayed, if he should see proper to renew this suit. We are of opinion, that the facts proposed to be proved were admissible, under a suitable state of pleadings. The petition of the plaintiff did not contain matter sufficient to admit many of the facts sought to be proved, and it is obvious that the merits of this suit cannot be properly investigated, without additional averments in the plaintiff's statement of his cause of action. It is clear that a sheriff's sale, under execution, may be shown to be collusive or fraudulent, and that there was a secret reservation of a trust in favor of the defendant, with the consent of the purchaser. But there was no foundation in the pleading for such evidence. The plaintiff submitted to a non-suit, on the refusal of the court below, to permit him to amend his petition.

2. The matter of permitting amendments is so much in the discretion of the court, who tries the cause, that this court has always expressed its aversion to interfering with the judgments of the inferior courts, in relation to such matters. Courts of original jurisdiction should be liberal in the allowance of amendments in furtherance of justice. The late code calls for the liberal exercise of this power, and furnishes ample authority in support of it.

The court is unanimous in the opinion, that the judgment should be affirmed.



CARROLL, Defendant in Error, *vs.* PAUL'S ADMINISTRATOR,  
Plaintiff in Error.

1. It is not necessary to declare upon an agreement not under seal, but it is admissible in evidence, in support of the common counts in an action of assumpsit.
2. Although there is a variance between the declaration or bill of particulars, and the evidence offered in support of it, yet, where there have been previous trials of the cause, so that the introduction of the testimony is no surprise, the objection of variance is untenable.
3. Although the Supreme Court will not interfere with the verdicts of juries, on the ground that they are against the weight of evidence, yet, when hard cases appear

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to arise under the operation of this rule, it must be satisfied that the instructions are entirely unexceptionable.

4. When an account between parties is stated, with debit and credit sides, and the very matter about which the controversy arises is stated in the account, the presumption of law is, that the account is just, unless it be shown that there is some fraud, omission or mistake.
5. Instructions, which are mere comments upon evidence, are properly refused.

*Error to St. Louis Court of Common Pleas.*

*B. A. Hill*, for plaintiff in error.

I. The court below erred in admitting the written agreement, dated May 1st, 1844, in evidence in this action, in *indebitatus assumpsit*, on the common counts.

II. The first instruction for the plaintiff ought not to have been given. The written agreement was, by this instruction, declared to be in force, and the jury was authorized to find a verdict in general *indebitatus assumpsit*, for the services the plaintiff had performed under said *covenant*. The plaintiff was not entitled to recover *any thing* in general *indebitatus assumpsit*, for the services he performed under the written agreement, and the court having authorized the jury to find a verdict therefor, the error is manifest, and the judgment must be reversed. *Gale v. Nixon*, 6 Cow. 445. 1 Chitty's Pleadings, 117, and authorities there cited. Chitty on Contracts, 565. 8 Carr. and Payne, 126. 8 Mo. Rep. 118, *Stollings v. Sappington*. 8 Mo. Rep. 517, *Chambers v. King and Tunstall*. Sel. N. P. 71 (7 ed.) 1 Wils. 117, *Alcorn v. Westbrook*. 2 East. 145, *Hulle v. Heightman*.

III. The court erred in admitting the written contract of Paul, dated 15th February, 1846, disputed by Paul on the trial, as a forgery. There was no description of that instrument in the bill of particulars, nor any statement in the declaration or bill of particulars, from which its existence could be inferred. There is no item in the bill, to which said agreement can be made to apply. The charge for extra services in the bill is under date of December 1st, 1846, at seven hours per

day, for two years and six months at \$466 66-100 per year. The writing is of a different date; declares the hours of service to be nine hours per day; that Paul will pay at the *same rate* provided for in the *covenant*, and that the contract was prospective in its operation. The variance between that contract and the bill of particulars, is so glaring as to preclude argument.

a. The rule is well settled, that a variance between the evidence offered and the bill of particulars is fatal to the case. See *Holland v. Hopkins*, 2 Bos. & Pull., 243. 3 Esp. 168. 4 ib. 7. *Breckon v. Smith*, 1 Adolph. & Ell. 488. 2 Sell. 339. *Quin v. Astor*, 2 Wend. 577. 1 Cowen, 574, and note. *Edwards v. Ford*, 2 Bailey, 461. *Brown v. Calvert*, 4 Dana, 219. *Stanley v. Millard*, 4 Hill, 50. *Starkweather v. Kittle*, 17 Wend. 20. *Gilpin v. Howell*, 5 Barr, 41. *Graham's Pr.* 514. *Dunlap's Pr.* 404.

b. The particulars of the plaintiff's demand at the trial, are considered as incorporated with the declaration, and the party is not allowed to give any proof outside of them. 14 John. 329. 15 John. 222. 1 Camp. 60. *Peake's Case*, 172. *Williams v. Sinclair*, 3 McLean, 289. *De Sobry v. De-Laistre*, 2 Har. & John., 223, 191. *Brown v. Watts*, 1 Taunt. 353. *Babcock v. Thompson*, 3 Pick. 446. *Brittingham v. Stevens*, 1 Hall's Rep. 379.

c. The second charge in the bill of particulars is, "for balance due on service, from 1st of May, 1844, to 1st of November, 1846, as per written agreement, \$166 66." A balance due was not shown by the sealed *covenant*, nor was it any evidence of a balance due; nor was there any proof of such balance. Immediately following this item, is the item referred to in the 4th point, to wit: "December 1st, 1846, extra services *other than contained or mentioned in above named written agreement*, being seven hours each day for the term of two years six months, \$466 66 per year—\$1,166 65." This clearly precludes the construction, that any agreement in *writing* existed in relation to extra services.



The paper of the 15th February, 1846, viewed as a contract, is different from the charge in the bill, as to date, time of service, hours of employment per day, and terms of contract. The variance, therefore, is not only manifest, but there is hardly any similarity between any part of the charge and the evidence, as offered by the plaintiff, in said paper of the 15th of February, 1846.

d. If the plaintiff is permitted by the court to *amend* his bill of particulars, it should be only on terms of paying all the costs, except the writ and jury fee. He has urged the defendant to trial on a false bill, totally variant from the proof, and if he now asks leave to change his ground, he must pay the expense of a controversy in which his claim is falsely stated.

IV. The action on the agreement of May 1st, 1844, and February 15th, 1846, should have been upon them in special assumpsit.

V. The first instruction, asked by the defendant and refused by the court, ought to have been given, as all the propositions therein are good law, and strictly applicable to the case. The first instruction (No. 14,) given by the court, in lieu of the first one asked by the defendant, does not embrace the points of direction to the jury, to which the defendant was clearly entitled, and for which he asked in his first instruction.

VI. The defendant was entitled to the fourth instruction, (No. 2 refused,) as will be seen from the testimony. If Carroll acknowledge the justice of account "O," after he left Paul's service, then he had no claim against Paul for services, except those therein specified; and the paper of the 15th day of February, 1846, purporting to be a claim for \$600 a year for services, is fraudulent.

VII. The 13th instruction, (No. 6 refused,) as a rule of evidence, ought to have been given. It is good law, and peculiarly applicable to this case. The weight of the verbal admissions, at a remote period of time, is properly contrasted with the solemn admitted written testimony of the plaintiff, in his letter and in the defendant's books; and the refusal of the

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court to give this direction may have tended to produce the unconscionable verdict, rendered in this case. Greenleaf on Evidence, vol. 1 sec. 200.

VIII. The agreement for *extra services* being for only six hours per day, the second instruction is erroneous; for it authorizes the jury to find extra services to the extent of the charge in the bill of particulars for seven hours per day. This is clearly erroneous.

*Todd & Krum*, for defendant in error.

I. The bill of particulars, furnished by the plaintiff, specifies the services sued for, the length of time that the plaintiff rendered services, and the amount claimed, with sufficient particularity to enable the defendant to meet it at the trial. This is all the law requires. 1 Dunlap's Practice, 404. Graham's Practice, 514. 9 Wheat. Rep. 581. 9 Peter's Rep. 541. 6 Cow. 449. 4 Wend. 360. 5 Wend. 51.

II. The court below did not err in admitting the written agreements, Nos. 1 and 2, in evidence. The said agreements are *not under seal*, and they were competent evidence under the declaration and bill of particulars. They were not offered in evidence as the foundation of the action, but to prove the items for work and labor in the plaintiff's bill of particulars.

The law is now well settled, that where there is a special or written contract, the whole of which has been executed, on the part of the plaintiff, and the time of payment is past, *general assumpsit* can be maintained, and the measure of damages is the rate of recompense fixed by the special contract. 7 Mo. Rep. 530. 7 Cranch Rep. 299. 11 Wheat. 237. 2 Smith's leading cases, p. 19 *et seq.*, and the note to the case of *Cutter v. Powell*, where the whole doctrine and authorities are reviewed.

III. The court below did not err in giving the instructions asked by the plaintiff.

The first and second instructions are applicable to the written agreements, and both the instructions assert a correct rule of law. If the said written agreements were competent evidence

under the plaintiff's declaration and bill of particulars, then the court ruled correctly as to their effect.

The instruction numbered four, asserts a correct principle of law, upon the facts in the case.

The instructions three and five, also assert correct principles of law. Even the defendant's counsel did not claim before the court below, that the letter referred to in instruction No. 3, and the account "O," referred to in instruction No. 5, were *conclusive*, as to the state of accounts between the parties, but admitted that they were not. See instruction 5, (No. 10 given,) asked by the defendant.

The instructions numbered six and seven are rendered nugatory by the act of the defendant himself. These instructions have relation to, and were exclusively applicable to the *set-off* of the defendant, which was formally abandoned and withdrawn by the defendant, after the instructions were given by the court. * Of course, these instructions *could* not and *did* not prejudice the defendant.

IV. The court below did not err in overruling the instructions asked by the defendant.

The instruction No. 1, refused by the court below, contains propositions which are not founded on any facts in the case. Every proposition embodied in that instruction, which has relation to, or is founded on the facts in the case, was given by the court in other instructions to the jury. There was neither sense nor propriety in repeating the same propositions to the jury.

The instruction No. 4, (No. 2 refused,) asked by the defendant, and refused by the court below, contains a palpable *non sequitur*.

To say that an admission by the plaintiff, made in January, 1847, that he was indebted to the defendant, is *prima facie* evidence that "*the signature of Paul to agreement No. 2, was fraudulently obtained,*" is a proposition so grossly absurd, that a bare statement of it is its own best refutation.

The instruction No. 7, (No. 3 refused,) asked by the

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defendant, and refused by the court below, cannot be sustained upon principle or authority. As an abstract proposition, it is stated too broadly, and was calculated to mislead the jury. But the point to which this instruction was directed, was fully covered by an instruction already given by the court. See instruction No. 7, asked by the plaintiff, and given by the court.

The instruction No. 9, (No. 4 refused,) asked by the defendant, and overruled by the court, is unsound. If the instruction had simply declared, that the written admissions of the plaintiff in the books of the defendant, as well as in the letter of February 14th, 1847, were testimony of a high and authentic character, as an abstract proposition, it might not be objectionable; but it goes further, and undertakes to declare, as a matter of law, that such testimony proves *the actual state of accounts between the parties, &c.*

The instruction No. 10, (No. 5 refused,) asked by the defendant, and overruled by the court, is not only unsound, as a legal proposition, but it would have been wholly inapplicable and nugatory, by reason of the defendant's own act on the trial. The set-off was abandoned, and consequently this instruction had no reference to any issue left before the jury. If the set-off of the defendant had not been abandoned, this instruction should not have been given.

The instruction No. 13, (No. 6 refused,) asked by the defendant, and refused by the court below, was properly refused. The court had already instructed the jury, in respect to written testimony, in respect to parol testimony and in respect to admissions. There was no denial on the part of the plaintiff in respect to what was stated in his letter of January 14th, 1847, nor in respect to what appeared by his entries in Paul's books. There was no evidence given, to contradict or support either the said letter or said entries. The instruction, in the form it was asked, was calculated to confuse and mislead the jury. Besides, the instruction merely asserts abstract propositions, and which are not applicable to the facts of the case.

There is yet another reason why this instruction should have been refused. The conclusion, that "the verbal testimony, as to the declarations of parties, is to be received with great caution," is stated too strongly, and as an abstract proposition is erroneous.

It is not true, as a matter of law, that verbal testimony is to be received with great caution. Verbal testimony is to be received and weighed by a jury, like any other testimony. A verbal statement may be as certain as one that is written, if there be no circumstances calculated to weaken one's confidence in the recollection of the party, or witness, making such statement, and there is no greater caution to be used in the one case abstractly, than in the other. The memory of a witness, who gives a verbal statement of a fact, may be in fault, and, on the other hand, the writing, relied on as containing a given fact, may be all interpolation or forgery.

V. The court below did not err in refusing to grant a new trial. There had already been two trials, and the jury, upon the third trial, (the verdict now under consideration,) did not err in any matter of law.

SCOTT, Judge, delivered the opinion of the court.

This was an action of assumpsit, begun by Carroll against Paul, for services rendered as an agent. The account for the services was evidenced by two written agreements. By the first, dated May 1st, 1844, it was agreed that Carroll should have two hundred dollars per year, payable quarterly, in consideration that he would act as agent for Paul, in settling accounts, keeping his books, collecting rents, &c., provided, that on an average, he should not be employed more than three hours per day. This employment was not to interfere with any other business of Carroll's. If he rendered three hours service a day, he was at liberty to do what else he thought proper. By a second agreement, dated the 15th of February, 1846, Paul agreed to pay for all extra services that had been, or should be rendered under the first agreement, and in it, is contained this admission by Paul: "I do think the services men-

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tioned to be equal to about nine hours per day." Objection was made to the reading of the first agreement, because it was a covenant, and could not be declared on in *assumpsit*; and to the second agreement, because the claim it established was variant from that in the bill of particulars. Under this agreement, the bill of particulars claimed for seven hours service, extra, per day. No reference is made in the bill of particulars to the agreement, under which the item for extra services is claimed. The bill of particulars claims for full services, under the first agreement, from the 1st of May, 1844, until the 1st of November, 1846, and the extra services are claimed for the same time. Paul was the owner of some city property, and the leasing and the selling of it, and the collection of its rents, &c., the only business in which he was employed. Some time after Carroll left the employment of Paul, an account against him was presented, in which, after allowing credits, a considerable balance was claimed. This account included, amongst other items, one for money due for lands in Lincoln county, sold to Carroll, and gave him credit for his services under the first agreement, at the rate of two hundred dollars per annum. Carroll agreed to pay the account, although he complained that the Lincoln lands were included in it. On the 14th of January, 1847, Carroll wrote a letter to Paul, in which he acknowledged the receipt of the account, and confessed that he ought to have called before and settled with him, and begged for indulgence. This suit was commenced on the 28th of August, 1847. Many witnesses, acquainted with Paul's handwriting, were examined touching the genuineness of the signature to the agreement, relative to the extra services, some of whom believed the signature to be Paul's, others believed the contrary. There was some evidence that Paul acknowledged a willingness to pay for extra services. The evidence with regard to the number of hours in a day, necessary to transact the business of Paul, was contradictory. Some witnesses thought three hours a day more than sufficient, and one witness testified that he was employed nine hours. A clerk, who



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did the services rendered by Carroll, testified, that his conscience would not let him take twelve dollars per month for them. He thought ten dollars per month a sufficient recompense. There was a verdict for the plaintiff for \$973 62. After verdict, Paul died, and the suit was revived in the name of M. Brotherton, his administrator, who appealed to this court. The court gave and refused the instructions which follow.

Those given by the court, on the part of the plaintiff, are:

1. If the jury believe from the evidence that the defendant made the agreement read in evidence, dated May 1st, 1844, and that the plaintiff performed services for the defendant, in conformity with said agreement, then the plaintiff is entitled to recover, according to the price specified in said agreement, for all the services which the jury shall believe from the evidence the plaintiff performed, under said agreement, not to exceed, however, the amount claimed in his bill of particulars, in this suit.

2. If the jury believe from the evidence, that the defendant made the agreement, read in evidence, dated February 15th, 1846, and that the plaintiff performed services specified in said agreement, for the defendant, then the plaintiff is entitled to recover, according to the price specified in said agreement, for all the services which the jury shall believe, from the evidence, the plaintiff performed for the defendant, as contemplated by said agreement, not exceeding, however, the amount claimed in the plaintiff's bill of particulars.

3. The letter written by the plaintiff to the defendant, dated January 14th, 1847, is not conclusive evidence against the claim of the plaintiff; therefore, if the jury shall believe from all the evidence, that the defendant was, in fact, at that time, indebted to the plaintiff for services, as stated in his bill of particulars, then the jury should find for the plaintiff whatever amount the jury shall believe from the evidence the defendant was so indebted.

4. If the jury believe from the evidence, that the instrument of writing, dated February 15th, 1846, was subscribed by the

defendant, the jury must presume that he knew the contents of said writing, at the time he subscribed it ; unless the jury, at the same time, shall believe from the evidence that he was not competent, by reason of some mental or physical disability, to make or understand the said writing ; or that the same was obtained from him by fraud or deception.

5. The books of accounts, as well as the account marked "O," offered in evidence by the defendant, are not conclusive against the plaintiff, as to the state of accounts between him and the defendant, and the whole may be explained by the evidence in the case ; therefore, if the jury shall believe from all the evidence, that the defendant is justly indebted to the plaintiff for the services sued for, the jury should find accordingly.

6. If the jury believe from the evidence that the moneys collected by Carroll, while acting as Paul's agent, were paid over to Paul and accounted for to him, then the jury should disallow the claim for said moneys made by the defendant in this case.

7. If the jury believe from the evidence that the defendant, on or about the time stated by the witness, Barr, rendered the account marked "O" to the plaintiff, and that said account does not contain the moneys claimed in this suit by the defendant, as having been collected by the plaintiff and not accounted for, the rendering of said account by the defendant is *prima facie* evidence that the claim for such moneys is unfounded, unless the jury shall believe from the evidence, that Paul, at the time he rendered said account, did not know that Carroll had collected the said moneys and had not accounted therefor.

To the giving of each of the above instructions, the defendant, at the time, objected and excepted.

Those given by the court for the defendant, are the following:

8. If the jury should believe from the evidence, that the signature to the agreement No. 2, was made by Paul, yet, if they find from all the evidence and circumstances of the case, that Paul did not owe Carroll anything, upon a fair settlement of

accounts, at the time of the commencement of this suit, they are authorized to find for the defendant, notwithstanding said agreement No. 2.

9. If the jury believe from the evidence, that Carroll and Paul had a settlement, after Carroll left the employment of Paul; that the bond given by Carroll and his securities to Paul, was cancelled thereon, and that Carroll paid the balance to Paul, which was claimed in account "O," without making any claim at that time for extra services, and that such balance was paid, in accordance with the promise made to John Barr and to the defendant, in the letter of the 14th of January, 1847, then the jury are authorized to find for the defendant; unless the jury are further satisfied from the evidence, that said settlement and payment were not a full and complete settlement between the parties, nor so designed by them.

10. If the jury believe from the evidence, that the plaintiff, upon the receipt of account "O," wrote the letter to defendant, dated January 14th, 1847, asking further time to be given him for the payment of money acknowledged to be due to the defendant by him, that is evidence (the said letter is not conclusive evidence on that point,) from which the jury would be authorized to infer that the plaintiff, Carroll, did not then regard Paul as his debtor, on the account here sued for.

11. If the jury believe from the evidence, that the signature to agreement No. 2 was written by Paul, yet, if the jury should also believe from the evidence, as presented in the books of account kept by Carroll, the letter of the 14th of January, 1847, written by Carroll, in answer to account "O," and from all the other circumstances of the case, that said Carroll has fully settled with the defendant for services; or that said Carroll has, by his acts or declarations, admitted himself to have been fully paid and satisfied for his services, they will find for the defendant.

12. The account kept in the ledger and cash book of Paul, by Carroll, is competent, though not conclusive evidence, to show the state of accounts between Carroll and Paul, as to the

matters of account therein embraced and for the period of time therein included.

13. The paper called agreement No. 2 is not *prima facie* evidence of its own genuineness in this case. The burden of proof of the genuineness of the signature of Paul to said agreement No. 2 is upon the plaintiff.

Instead of the defendant's first and third instructions, which were refused, the court gave the following :

14. If the jury believe from the evidence, that the signature to the paper, dated February 15th, 1846, is a forgery, or that Paul never signed said paper, or that said paper was obtained from Paul fraudulently, then they will disregard said paper in their consideration of this case.

15. Evidence of verbal admissions of parties to a suit, at a distant period of time, should be received with great caution, in order that the precise admission may be ascertained. In determining what weight ought to be given to the testimony of verbal admissions, the jury should consider the opportunity which the witness had of hearing distinctly the alleged admissions, and the probability of their being distinctly remembered for so long a period.

The instructions asked by the defendant, and refused by the court, are as follows :

1. If the jury believe, from the evidence, that there is no consideration for the agreement of February 15th, 1846, or that the signature of Paul thereto is a forgery, or that the writing over the signature was filled in by the plaintiff, without Paul's consent : or that from all the circumstances of the case, said agreement was not held by the plaintiff, and had not been delivered by the defendant to the plaintiff, as a valid and subsisting agreement, then the jury are authorized to disregard said agreement, in their consideration of this cause.

2. If the jury believe from the evidence, that after the plaintiff, Carroll, left the service of Paul, he (Carroll,) acknowledged himself to be indebted to Paul, upon the account delivered to him by John Barr, and asked for further indulgence,

that circumstance is *prima facie* evidence, that the signature of Paul to agreement No. 2 was fraudulently obtained.

3. Evidence of verbal admissions of parties to a suit, at a distant period of time, is a weak kind of evidence, and is always to be received with the greatest caution by a jury.

4. The written admissions of Carroll, in the books and in the letter of the 14th of January, 1847, are testimony of a high and authentic character, showing the actual state of accounts between the parties, at the time such admissions were made.

5. If the jury believe from the evidence, that Carroll has not accounted for all the moneys of Paul, which he had collected, while acting as Paul's agent, they are authorized to find a verdict for the defendant, for such sum as the jury shall believe from the evidence, the said Carroll has failed to account for; and in ascertaining such amount of money not accounted for, the jury are authorized to regard the condition of the plaintiff, as to means and capital, when he went into the defendant's service, his means of accumulation while in such service, and the amount of property and money he had at the conclusion thereof.

6. The evidence of the plaintiff's admitted handwriting, in the letter of January 14th, 1847, and in the defendant's books, is of a much higher and more reliable character, than the evidence given in relation to verbal declarations of the parties, at a remote period of time. The written testimony is certain and definite, so far as it goes; the verbal testimony, as to the declarations of parties, is to be received with great caution.

1. There was no error in receiving the first agreement in evidence under the pleadings. The action was assumpsit in form, and the agreement, not being under seal, was, of course, evidence in support of the common counts in the declaration, the agreement having been executed. The instrument not being sealed, it was not necessary to declare upon it.

2. We consider that there was a variance between the second agreement and the item founded upon it in the bill of

particulars. This objection, however, might have been obviated by an amendment, on such terms as would serve the ends of justice, and as the circumstances of the case required. This, however, could only have been necessary on the first trial. As the last was the third trial of the cause, we are at a loss to conjecture how the defendant could have been injuriously affected by the introduction of such testimony. It certainly created no surprise, as the former trial must have informed him of the future course of the plaintiff. Under the circumstances, we consider the objection untenable.

3. This court will not interfere with verdicts, on the ground that they are against the weight of evidence. We do not sit here to reverse the verdicts of juries, when the law of the case has been properly put to them. The propriety of this rule is demonstrated by the fact, that every member of the profession deems it a good one, if so limited in its operation as not to affect his cases. It is obvious, that any relaxation of the rule, in particular cases, would have the effect of bringing up for review a large number of verdicts, as the zeal of parties would readily persuade them, that their cases were within the exception. But while this is our purpose, we cannot shut our eyes to the fact, that under the operation of this rule, some hard cases will arise. In such, this court must be satisfied that the instructions given for the party obtaining a verdict, are *omni exceptione majores*; for we will not presume that, in a plain case, the jury have trodden the facts under their feet, but that they must have been misled by the instructions of the court. It is but occasionally that juries will take the bit in their teeth and go where they please. In most cases, they are willing that the responsibility of their verdict should rest on the court.

The second instruction given for the plaintiff cannot be maintained, as it involves a misconstruction of the second agreement. That agreement contains an expression of the opinion, on the part of Paul, that the services of Carroll were equal to about nine hours a day. That opinion must be construed to mean, that nine hours a day were necessary to do the



services required, as the opinion is expressed, not only for the term past, but for that to come. There was no evidence that more than nine hours were employed. Indeed, it was conceded in the argument, that compensation could be claimed for but nine hours service. This instruction, then, taken in connection with the bill of particulars, to which it refers, authorized the jury to fix the services at ten hours.

4. The instructions given, with regard to the effect of the admission of the justice of the account, and that contained in the letter of the 17th of February, 1847, were not expressed in terms, such as the circumstances of the case required. The verbal admission and the letter made the account rendered a stated account. The account had both a debit and credit side, and the plaintiff was credited for services, from the 1st of January, 1846, till the first of November following, and was allowed only for three hours services per day. The plaintiff admitted twice, that this account was just. Under such circumstances, the jury should have been told, that the account was conclusive between the parties, unless some fraud, mistake, omission or inaccuracy is shown. It is no answer to say, that the fifth instruction (No. 10 of the instructions given,) asked by the defendant, gives the same law as to the inconclusiveness of the effect of the admissions. If the parenthesis in that instruction was inserted by the defendant, such an act must have been induced by the previous instruction of the court, given at the instance of the plaintiff. The defendant was obliged to take the law as it had been declared by the court. He did all he could; he excepted to the instructions, and was compelled to go to the jury with the law as it had been given. When an account between parties is stated, as this one is, with debit and credit sides, and the very matter, about which the controversy arises, is stated in the account, the presumption of law is, that the account is just, and by that presumption the jury should stand, until they are satisfied that there is some fraud, omission or mistake. *Gibson v. Hanna*, 12 Mo. Rep. 162.

5. There was no error in refusing defendant's instructions

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numbered 2, 4, 5 and 6, as they were comments on, or directions to the jury, to draw inferences from certain facts. Such instructions involved no law, and comments on the evidence are not to be given to the jury by way of instruction. If the Judge sees proper to comment on the evidence to the jury, he should do it in such a way as not to infringe on the rights of juries. They are not obliged to take his views of the evidence in a cause, although he may grant a new trial, where justice requires it. The other Judges concurring, the judgment will be reversed, and the cause remanded.

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RUTH McLAUGHLIN, Respondent, vs. JAMES McLAUGHLIN'S ADMINISTRATOR, Appellant.

1. Under the new code, the St. Louis Court of Common Pleas has equity jurisdiction.
2. Under the code, a person, claiming an interest in a suit adverse to the plaintiff, cannot become a party defendant without the permission of the court. In a suit in equity against a trustee, to get the legal title to property which had been conveyed to him by a deceased person, in trust for plaintiff, after the administrator has already made himself a party defendant, it is no error for the court to refuse permission to the widow, heirs and distributees of the deceased to become parties, as the administrator is competent to make all defences to the action.
3. A trustee is a competent witness for the *cestui que trust*, in respect to the trust property. If, however, he were incompetent, the dismissal of the suit as to him, after his testimony had been taken, would not restore his competency.
4. A conveyance of an intestate cannot be impeached by his administrator or heirs, for fraud as to creditors. None but creditors themselves, and those in privity with them, can avoid it.
5. Under our statute, a widow is entitled to dower in no other personalty than that which belonged to the husband at the time of his death.
6. None but a creditor or purchaser can raise the objection that a deed conveying articles consumable in the using, the grantor retaining possession, is void.
7. The admissions of the grantor in a deed of trust after its execution, although not admissible against the *cestui que trust*, are in his favor.
8. A *cestui que trust* files a bill in chancery against the trustee to get the legal title to the trust property. The administrator of the deceased grantor in the deed of trust, on his application, is made a party defendant. During the trial, the plaintiff dismisses the suit, as to the trustee. Held, no judgment can be rendered against the administrator on a demand against the estate growing out of the trust property. If it could be, evidence would be admissible to show that a large portion of the trust estate had come to the hands of the plaintiff, as administrator of the deceased in another state, to reduce the verdict.

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9. The code does not affect the rule against multifariousness. A suit against the trustee for the legal title to the trust property, and against the administrator, on a demand growing out of the property, cannot be joined.

*Error to St. Louis Court of Common Pleas.*

*DeLafield*, for appellant.

I. The court erred in admitting the testimony of Theron Barnum, as he and plaintiff were *privies in estate*. *Guy v. Hall*, 3 Murph. 150. *Hart v. Horn* 2 Camp. 92. 7 Moore, 307. Lewin on Trusts and Trustees, 18 Law Lib. 22, p. 10. *Ib.* p. 11.

II. This is not a case where the admissions of a grantor are received as against himself. Here it is sought to prove his admissions in his own favor; therefore they are inadmissible. 3 Rawle, 437. 5 Serg. & Rawle, 295. 1 Bailey R. 101. 9 Serg. & Rawle, 47, 53-4-5. 11 Wend. 533. 2 Conn. Rep. 467. 2 Mart. La. R. (N. S.) 13. 3 Mart. 22.

III. But again: to receive either the written or oral declaration of an assignor *after assignment*, would be wrong. *Jackson ex. dem. Goodrich v. Ogden*, 4 Johns. 140. *Tuttle v. Hunt*, 2 Cowen R. 436. *Penfield v. Carpenter*, 13 Johns. R. 350. *Fisher v. Bailey*, 1 Ashmead's R. 209. The testimony, therefore, of Messrs. Singleton, Crosby and others, as to the admissions or statements of James McLaughlin, after the assignment or deed of trust, not being part of the *res gestæ*, was erroneously admitted.

IV. The administrator is trustee not only for creditors, but for distributees, &c. He represents the estate for the benefit of the creditors and legatees. He is their trustee; therefore he ought to be permitted to do what his *cestui que trusts*, the creditors, might do. He, therefore, should be authorized to attack a fraudulent deed. Story's Equity Plead. 182. 1 Verm. 261. *Brown v. Dowthwaite*, 1 Madd. R. 242. *Dandridge v. Washington*, 2 Peters R. 377.

V. An estate in dower always relates back to the marriage. Fulwood's case, 4 Rep. 65-66. *Combs v. Young*, 4

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Yerg. 218. 2 Black. Com. 129, 130, 132. 1 Thomas' Coke, 576. 7 Co. Littleton, 31 *a*. 1 Thomas' Coke, 567. The administrator is trustee for the widow as to her dower. By sec. 3, chap. 54, Rev. Code, 1845, p. 430, there being no children of the marriage, the widow is entitled *absolutely* to one-half of the personal estate here sued for. And even the widow of an *alien* resident, dying in this state, is entitled thereto. *Stokes v. O'Fallon*, 2 Mo. Rep. 32. Before all others, then, creditors or otherwise, she is entitled to the one-half of this personalty. The administrator is a trustee to pay the same to her. As her representative, he ought to protect her rights.

After a title of dower has once attached, it is not in the power of the husband alone to defeat it by alienation or charge. *Park on Dower*, 237. A conveyance then, in fraud of, or to defeat dower, is void.

VI. The court erred in excluding testimony tending to show the fraud and bad conduct of the plaintiff and decedent in regard to the deed of trust under which she claims, for the further reason that she seeks not to prove in any manner, (except by admissions of her partner in fraud) the pretended claim she sets up; any conduct, then, tending to discredit his own admissions as testimony, was lawful.

VII. The court also erred in refusing to charge the jury that when a deed embraced articles consumable in the using, the grantor retaining possession, the deed was void, the assignment having no operation. *Somerville v. Horton*, 4 Yerg. 541-52. *Charlton v. Lay*, 5 Humph. 496. *Simpson v. Mitchell*, 8 Yerg. 417-20. *Young v. Pate et al.*, 4 Yerg. 164. *Darwin v. Handley*, 3 Yerg. 502-5.

VIII. The court erred in refusing to arrest the judgment for three reasons:

1. The want of proper parties. 7 T. R. 667. 1 Chitty's Pl. p. 3. Story's Eq. Pl. sec. 207.
2. The want of jurisdiction to pronounce a judgment. Rev. Code, 314.

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3. The dismissal of the case as to defendant, Barnum, is fatal to a judgment in plaintiff's behalf.

*Glover & Campbell*, for respondent.

I. The new code of practice does not authorize the heirs at law of a decedent to make themselves parties to a proceeding by a creditor to have a demand allowed against the administrator of such decedent.

II. The evidence offered by the appellant to prove that the deed was fraudulent as to the creditors of James McLaughlin, deceased, was properly rejected by the court, because the answer of the administrator contained no notice of any such defence.

III. But the allegation of fraud could not reach the respondent in this case. The marriage not being legal, the right of the wife to the money which passed into the husband's hands immediately on the performance of the marriage ceremony, was never divested. She was a creditor of James McLaughlin, and had the right to establish her demand upon his estate, like any other creditor, on the deed, or independent of it; so that the fraud alleged is entirely out of the case.

IV. The supposed judgment records were properly rejected, for two reasons: 1st, they were not duly authenticated as complete transcripts of entire records; 2d, they had not been filed, as relied upon by the defendant, according to law.

V. But if the deed of James McLaughlin was fraudulent as to creditors, that did not authorize his administrator to avoid it; neither could his heirs. 6 Shepley, 236. 2 T. R. *Edwards v. Harben*, 589. 7 Johns. Rep. *Osborn v. Moss*, 163. Many authorities might be cited.

VI. There was no actual necessity for the presence of Barnum as a party to the suit. The only decree, which the plaintiff asked against him, was to divest the trust; and this was not done by the court. There was no money found in his hands, and no judgment could therefore be rendered against him. When this was made manifest, and the trial was finished, the plaintiff dismissed her suit as to Barnum. The purpose of

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this dismissal was merely to relieve the jury of the necessity of finding a verdict in his favor. If the plaintiff had not done this, it is manifest upon the record, that the court would have been compelled to do the same thing, as soon as the jury returned into court.

SCOTT, Judge, delivered the opinion of the court.

In June, 1850, Ruth McLaughlin filed her petition against Theron Barnum, trustee.

The petition states, that prior to the solemnizing of the rites of marriage between the plaintiff and James McLaughlin, she was possessed of more than two thousand dollars in money; that in May, 1839, she was married to McLaughlin, and her money went into his possession; that in May, 1840, McLaughlin, residing in Illinois, executed to defendant, Barnum, a deed of trust, whereby he conveyed to him certain leasehold estate in Illinoistown, and certain merchandize then in a store, amounting in value to about two thousand dollars, to be held in trust for the benefit of the plaintiff. McLaughlin, after the execution of the deed, retained possession of the property mentioned in it, as agent for the plaintiff, managed the same for her use, and realized thereon a profit of about twenty per cent. per annum till the time of his death, in January, 1849. That McLaughlin received from the sale of the leasehold premises seven hundred dollars, and never accounted with the trustee, or any one else, for the profits made from the property covered by the deed of trust. That McLaughlin died, leaving an estate of several thousand dollars in the county of St. Louis, and at the time of his death owed few or no debts. The plaintiff then prays for a judgment for the amount of the property included in the deed, and the profits made therewith, and a decree for said sum of money, the avails and profits of said merchandize, and said leasehold interest, with the interest and gain thereon, to her, free from the trust to said Barnum.

Hudson came in, and acknowledged himself the administrator of James McLaughlin, and made a formal answer, disclosing nothing in relation to the suit.



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Barnum answers, and admits all the material facts stated in the petition, and alleges that none of the trust property, nor any part thereof, ever came to his hands.

At this stage of the proceedings, an answer was filed for M. McLaughlin, who claimed to be the lawful wife of James McLaughlin, and for his brothers and sisters, as his heirs and distributees, alleging the invalidity of the deed of trust, on the ground that it was made to defraud creditors, and praying a distribution of the estate among them. This answer was stricken out, and a motion was afterwards made to permit the former wife and heirs of the intestate to be made parties, which was overruled, to which there was an exception.

On the trial, the deed of trust was read in evidence, and Theron Barnum, the defendant, was examined as a witness. He proved the allegations of the bill. From his marriage till his death, McLaughlin was, at times, in very bad health, and his wife carried on the business of her husband in person. Barnum testified as to admissions made by McLaughlin touching his indebtedness to the plaintiff. These admissions were excepted to, as was the competency of Barnum as a witness. Other witnesses testified to material facts stated in the petition. The marriage of James McLaughlin to Margaret Walsh, prior to his marriage with the plaintiff, was admitted; but there was no evidence that she, the plaintiff, had any knowledge whatever of the fact.

Records, showing a considerable indebtedness on the part of McLaughlin, at the date of the deed of trust, were offered in evidence and excluded, to which an exception was taken. So also, the record of the proceedings of the Probate Court of St. Clair county, Illinois, showing that the plaintiff was administratrix of James McLaughlin, and that, as such, she had a large portion of the trust property in her hands, was offered in evidence and excluded, to which there was an exception.

Instructions were given to the jury, at the instance of the plaintiff, which were not excepted to, and therefore will not be noticed.

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When the jury was about to retire, the plaintiff dismissed her suit as to Barnum.

1. The question which, first in order, presents itself for our consideration is, whether the Court of Common Pleas has jurisdiction of suits, which, under the system of pleading and practice, which lately prevailed in this state, would be termed a suit in equity. It is conceded that, by the law of the organization of that court, it possessed no chancery jurisdiction, and if it now possesses any such jurisdiction, the result has been brought about by the operation of the recent code of practice. Although our State Constitution contemplates the existence of courts of law and equity, it does not restrain the General Assembly from altering the modes of pleading, in both actions at law and suits in chancery. The code does not attempt, nor was it designed, to take away any right, but only to provide one uniform mode of obtaining all rights, whether legal or equitable, and all causes of actions being now capable of being united in one suit against the same individual, the propriety of maintaining the distinction between the two jurisdictions is not perceived. To hold that the Court of Common Pleas had no jurisdiction in what would formerly be termed suits in equity, would deprive it of all admitted jurisdiction which it possessed in cases at law, where there was an equitable defence. For the sworn answer formerly required in equity proceedings, the direct examination of the party on interrogatories or on oath, as a witness, is now substituted. Hence the necessity of those long and tedious statements, heretofore found in suits in equity, no longer exists; and in matters which would formerly constitute a ground of action at law and a suit in equity, the same mode of stating the facts may now be adopted. It is improper to state the evidence of facts. It is required that the facts which constitute the action or defence, should be set forth, without a detail of the circumstances from which those facts may be presumed or inferred. In making the attainment of an equitable right, and of a legal one, depend upon the same form of procedure, in permitting legal and equitable ac-

tions to be united in the same suit, and in abolishing all distinctions between actions at law and suits in equity, the legislature must have contemplated that the jurisdiction of the Circuit Court and Court of Common Pleas of St. Louis county should no longer be distinguished by forms which were superseded.

2. The principle is not perceived, on which the propriety of the action of the widow, and the heirs and distributees, can be sustained. The code permits any person to be made a party defendant, who has an interest in the controversy adverse to the plaintiff. This surely does not permit the interference of a person in a cause, without the permission of the court. The court did not err in refusing them leave to become parties, as their interests were represented by the administrator of James McLaughlin, who had become a party. Had this been a proceeding in equity, under the old rules, the administrator would have been competent to make all defences against the claim of the plaintiff, nor would the parties have been necessary defendants. The old rules, with regard to parties in chancery proceedings, were sufficiently liberal, nor do we deem any enlargement of them required by law or policy.

3. There is no well founded objection to the testimony of Barnum. Though a party, he was a mere trustee, not liable for costs, and in no way interested in the event of the suit. The dismissal of the suit as to him would not have restored the competency of his evidence, which was taken before such dismissal, had he been incompetent at the time of his examination. This evidence was competent aside from the provisions of the code. In chancery, Barnum was a competent witness under the old system, and the code was designed to take away the disqualifications of witnesses, not to multiply them. *Gresley's Equity Evidence*, 244.

4. McLaughlin's administrator and heirs had no right to impeach any of his transactions, as being fraudulent against creditors. None but creditors themselves, and those in privity with them, can avoid an instrument, on the ground that it was made to defraud creditors. As a party to a fraudulent con-

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veyance cannot allege its illegality, with a view to its avoidance, so neither can his heirs nor representatives, coming in as volunteers, and standing, as it were, in his shoes.

5. The widow was not dowable of goods and chattels, at the common law. The writ of *de rationabili parte bonorum* was local, founded on custom, and not on the general law. Coke, 176 b. Hargrave & Butler's Notes. The wife's dower, at common law, and by our statutes, attaches to the land whereof the husband was seized during the coverture. Our statute only endows the widow of personalty belonging to the husband at the time of his death. Hence, any disposition he may make of his chattels during his life, a gift or any disposition to prevent the wife's dower attaching, if made during his life, will defeat her dower. The eighth section of the act concerning dower extends only to real estate. This much is said in relation to dower, if claimed under our law; but we presume, when the facts of this case are all disclosed, the rule for dower, as well as for distribution, will be found in the laws of the state of Illinois. If there is any surplus here, after administration in this state, it will be remitted to the administrator of the domicile of the deceased, for distribution. Rev. Code, 103, sec. 20.

6. Where can be the propriety of raising, in this case, the point, that a deed conveying articles consumable in the using, the grantor retaining possession, is void and inoperative? None but a creditor or purchaser can raise this objection. Such a deed would certainly be good against the grantor himself, and how can his widow or heirs raise an objection which the grantor himself could not raise?

7. On principle, the declarations of McLaughlin were admissible. His admissions, after the execution of the deed of trust, could not affect its validity, as against the grantee, or *cestui que trust*, but declarations against his interest, and in support of it, were clearly admissible.

8. The result of this suit is very different from that contemplated, as it would appear by the pleadings in the cause. It

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can only be sustained by an utter abandonment of all forms in legal proceedings. In its inception, the suit was only for the conveyance of the legal title in the trustee to the *cestui que trust*. The administrator is no party to the petition; no process is asked against, nor is any relief whatever sought against him. But for his voluntary appearance, his name would never have been mentioned, in connection with the proceedings. When the plaintiff let Barnum go, there was no foundation in the pleadings in the cause for a judgment against any one; it was a virtual abandonment of the action; and yet, without any prayer, without any complaint against him, a judgment is rendered against the administrator for seven thousand dollars, and no heed is taken of the cause for which the action is brought. If, under the circumstances, the proceeding could have been maintained against the administrator, the evidence offered to show that the plaintiff had obtained letters of administration, in the state of Illinois, on her deceased husband's estate, and that, by virtue of that administration, a large portion of the trust estate had come to her hands, should have been received. It must have affected the verdict, and reduced its amount. If any one in Missouri owes a debt to an administrator in Illinois, or has money belonging to him, it would seem that he can discharge himself by a voluntary payment to the administrator in Illinois. *Doolittle v. Lewis*, 7 Johns. Ch. Rep. 49. *Trecothick v. Austin*, 4 Mason 33. If administration has been taken out here, and there is no use for the assets, the Probate Court may order them to be paid to the administration of the domicile of the deceased, according to the law of which, they must be distributed.

9. We do not see the propriety of joining the trustee and the administrator in the same suit. Upon Hudson's becoming a party, his aim should have been, according to the proceedings, to prevent a decree against Barnum, the trustee. If the plaintiff has a demand against the estate of McLaughlin, that should be litigated, without the confusion and distraction consequent upon the introduction of the trustee. The code does not de-

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stroy or affect the rule against multifariousness. If the legal estate in the trustee is in the way of her enjoying her rights, it should be made subservient to the ends of justice, by proceeding against him alone for that purpose.

The other judges concurring, the judgment will be reversed, and the cause remanded.

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WIMER, Appellant, vs. PRITCHARTT, GARNISHEE OF TICE,  
Respondent.

1. A party cannot interplead in a cause to claim assets in the hands of a person summoned as garnishee on execution. The garnishee must answer at his peril.
2. Where a stakeholder in a wager is summoned as garnishee of the winning party, and the wager was determined without any demand upon the garnishee by the losing party for the money deposited by him, and he makes no claim, judgment will be given against the garnishee for the whole sum in his hands.

*Appeal from St. Louis Court of Common Pleas.*

At the February term, 1849, of the St. Louis Court of Common Pleas, the appellant recovered judgment against John H. Tice, for the sum of four hundred and nineteen dollars and eighty-five cents. On this judgment, execution issued returnable to the September term of the St. Louis Court of Common Pleas, and William H. Pritchartt was summoned as garnishee. The answer of the garnishee confesses that he had, at the time he was summoned, the sum of two hundred dollars, which had been deposited with him, as a stakeholder, by Tice and another person, the whole to be paid to Tice, upon the event of Firman A. Rozier receiving more votes at the congressional election, in August 1850, than James B. Bowlin should receive at the same election. The answer further admits that Rozier did receive more votes than Bowlin. Murray G. Lewis interpleads, claiming one hundred and twenty dollars of the money confessed by the garnishee, alleging that sixty dollars (part of the one hundred staked by Tice) was furnished by him. Upon



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this second trial below, the jury, under the instructions of the court, found for the interpleader sixty dollars, and thereupon, the court gave judgment in his favor for this sum, and for the plaintiff, on the answer of the garnishee, for the sum of forty dollars. After verdict, the plaintiff filed his motions in arrest of judgment, and for judgment *non obstante* upon the answer of the garnishee, for the whole sum of two hundred dollars, which motions were overruled.

*N. & S. A. Holmes*, for appellant.

1. The court had no jurisdiction of the interplea in this case. There is no provision for a proceeding by interplea, in the law concerning executions, except before the sheriff where property in specie is levied upon. In a garnishment under an execution, the issue between the plaintiff in the execution and the garnishee is simply one of indebtedness on the part of the latter to the defendant in the execution; the garnishee must answer at his peril, and no third party can step in between the plaintiff in the execution and the garnishee's own confession. Rev. Stat. 1845, chap. 61, sec. 6.

2. The remedy provided by interplea, in the law concerning attachments, is of a definite and distinct nature, and is no part of a garnishment, as such, and cannot be extended by analogy to garnishments under an execution. Rev. Stat. 1845, chap. 11, sec. 39. 13 Mo. Rep. 579, *Garrison v. McAllister & Co.*

3. The whole proceedings upon the interplea were *coram non judice*, and, therefore, the court erred in not sustaining the motion in arrest of judgment.

4. The motion for judgment upon the answer of the garnishee ought to have been sustained. The garnishee in this case is a stakeholder, and the defendant in the execution the winning party; it appears from the answer of the garnishee, that the losing party has never sought to avoid the wager, and that any right to recover the money from the stakeholder is barred by lapse of time; and the question simply is, whether the law will permit a stakeholder to set up the illegality of the transac-

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tion against an execution creditor of the winning party, and pocket the money. 1 Bos. & P. 3, *Tenant v. Elliott*.

5. The 11th section of the act concerning gaming does not alter the common law. The 12th section is a limitation of the rights of the losing party, as existing at common law. Rev. Stat. 1845, chap. 71, secs. 11 & 12. *Hickerson v. Benson*, 8 Mo. Rep. 11.

6. The garnishee in this case is not simply a depository—he is a stakeholder, and, as such, by his undertaking, bound to know who is entitled to the money; besides, the garnishee does not object, in his answer, that the money had not been demanded of him by the defendant, before the service of the garnishment; he cannot, therefore, avail himself of the decision of this court in the case of *Wood v. Edgar*, 13 Mo. Rep. 451.

*R. M. Field*, for respondent.

I. The interplea was properly admitted. Rev. Stat. Title Executions.

II. If a technical interplea was not admissible under the law, still, as a claim of right on the part of Lewis, the interplea was proper, and having been fairly tried and found in his favor, substantial justice requires that Lewis should have the money.

III. The wager was illegal, and is declared by statute to be gaming. The loser is entitled to recover back his money, either from the stakeholder or the winning party, if he receives it. The Court below, therefore, decided correctly, in holding that no notice of the winnings would be taken by the jury, and that Lewis could only claim in law the sixty dollars staked by him, and that the balance of the one hundred dollars should go to Wimer, as creditor of Tice.

IV. Besides, as there was no evidence that the wager had been decided, at the time the garnishee was summoned, he could not be adjudged the debtor of Tice, at that time, for more than forty dollars, which was all he then had in his hands belonging to Tice.

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V. There may be error in rendering a formal judgment in favor of Lewis against Pritchard, but no such error can be taken advantage of by Wimer.

GAMBLE, Judge, delivered the opinion of the court.

1. The statute, authorizing the sheriff to summon a debtor of the defendant as garnishee upon an execution, makes no provision for any third party interpleading to claim the assets in the hands of the garnishee, and for a very good reason. The garnishee is summoned, as himself a debtor to the defendant, and it is a matter of sufficient interest to him, to see that he is not required to pay the debt of the defendant, if he is not a debtor to the defendant. If he is in doubt as to the person who is his creditor, he has the means of bringing in all persons having an interest in the question, and having it determined, so as to relieve himself from doubt or responsibility. The judgment then rendered in this case, in favor of the interpleader Lewis, was erroneous, and is reversed.

2. The plaintiff, Wimer, moved for judgment against the garnishee for the whole amount which was in his hands as a stakeholder, holding the amount bet upon the congressional election. The act concerning gaming makes bets of this description illegal, and subjects the stakeholder to the action of each of the betting parties, for the money or property deposited by each. The payment of the money or the delivery of the property to the winner, is no defence to the stakeholder, if the party claiming the money deposited demanded it of him before the wager was determined. The statute contains the further provision, that all actions for money or property under the act must be commenced within three months from the time the cause of action accrued. As the wager in this case was determined without any such demand made upon the stakeholder, a payment by him to the winner would have been a good payment, and would have been a compliance with the terms upon which he received the money. No action appears to have been commenced against the garnishee by the losing party, nor does the loser claim the money. Shall the stakeholder keep the

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money? The judgment should have been rendered, under the circumstances, for the whole sum in the hands of the garnishee. This cause will be remanded for further proceedings.

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CARSON & BROOKES, Appellants, vs. STEAMBOAT DANIEL HILLMAN, Respondent.

1. On an open running account against a boat, the lien continues for six months from the date of the last item.

*Appeal from St. Louis Court of Common Pleas.*

On the 11th day of July, 1851, Elbridge G. Clark, one of the constables of St. Louis township, levied on the steamboat Daniel Hillman, in his township, under warrants from a justice of the peace, on lien claims under the statute. The boat not being bonded out in five days, the constable, on the 17th day of July, 1851, made a statement of the fact to the St. Louis Court of Common Pleas, and on that day an order was made by the Court, directing the constable to sell said boat, and on the 7th day of August, 1851, the same was sold by the constable, under said order, and the constable's return on the order of sale, was filed in the Court of Common Pleas on the 19th day of September, 1851, on which day, the Court of Common Pleas ordered the publication of a notice to creditors, to appear and present their claims for allowance on the 1st day of November, 1851. This order was duly published. On the 1st day of November, the plaintiffs filed their account for \$180, 59. This account commenced on February 6th, 1851, and terminated on the 28th of June, 1851. Plaintiffs proved the sale and delivery to the boat, at the request of the authorized officers thereof, of all the items in their account, at the dates in said account mentioned, and that the prices charged therefor, were reasonable, and that the goods thus furnished were such as were usual and necessary for the boat. Plaintiffs asked the following instructions :

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1. The plaintiffs ask the court to declare the law to be, that on an open and running account, like that presented by plaintiffs, proof of the last items of the account being in six months, will bring the whole account within the time, and preserve the lien of the first items of the said open and running account.

2. The plaintiffs ask the court to declare the law to be, that plaintiffs are entitled to recover all such items in their account, as they prove they furnished to the boat in the state of Missouri, at the request, and on account of any authorized agent of the boat, within six months before the boat was first seized, on the claims for which said boat has been sold, by order of this court.

These instructions the court refused, and plaintiffs excepted at the time. The court refused to allow to plaintiffs all that portion of their claim not furnished within six months before the day of filing the account; to which action of the court, the plaintiffs then and there excepted, and moved for a new trial, which motion was overruled by the court, and plaintiffs excepted, filed their bill of exceptions, and bring the case to this court, by appeal.

*Rankin & Gray*, for appellants, contended, that the account filed by them, should all have been allowed by the court below. It was an open running account, and the last items, being in time, drew the whole account within the time. Till the last items were furnished, there was no cause of action on the whole account. 9 Mo. Rep. p. 558. 12 Mo. 477.

GAMBLE, Judge, delivered the opinion of the court.

1. The only question which is presented for our consideration in this case, is, whether a lien upon a steamboat, arising upon an open running account, continues, for the purpose of being enforced by action against the boat, for the period of six months from the date of the last item. In the case of *Austin v. Stine*, 9 Mo. Rep. 558, it was held that the lien, under the act giving liens to mechanics and others upon buildings, might be filed within six months from the time the last item of lumber

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mentioned in a running account was furnished, and that the demand accrued from the date of that last item. In the case of *Beehler v. Steamboat Mary Blane*, 12 Mo. Rep. 477, the same construction was given to the act concerning boats and vessels. In the present case, the running account of the claimants, Carson, Brookes & Co., shows several of the last items to be within the time of six months, before the claim was presented for allowance, and under the previous decisions of this court, the whole account proved by the claimant should have been allowed. The judgment is, with the concurrence of the other Judges, reversed and the cause remanded.

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BARNES, to use of HAYES, Plaintiff in Error, *vs.* WEBSTER,  
Defendant in Error ; and  
UNITED STATES, to use of HAYES, Plaintiff in Error, *vs.* FER-  
GUSON, Defendant in Error.

- A., commencing an attachment suit against B., in the United States Circuit Court, executed a bond to B., conditioned to pay all damages that might accrue to B. or to any garnishee, by reason of a failure to prosecute the suit, with effect and without delay. *Held,*
1. In case of a breach of the bond, B. may maintain a suit thereon to the use of any garnishee who has been damaged.
  2. Such a bond, although voluntary and not authorized by any statute, is good as a common law bond.
  3. A bond with the same condition, made to the United States, instead of B., is valid, although not executed in pursuance of any law, nor in connection with any business of the United States, nor any duty of the obligor to them. A garnishee may sue on such a bond, in the name of the United States, to his use.

*Error to St. Louis Court of Common Pleas.*

Barnes, to the use of Hayes, brought an action in the St. Louis Court of Common Pleas, against Webster, on a penal bond for \$1,743, dated April 3d, 1844, reciting that one Ward had brought a suit by attachment in the United States Circuit Court, against said Barnes, and conditioned that if the said Ward should prosecute his suit with effect, without delay, and should pay all damages that might accrue to the defendant,



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Barnes, or to any garnishee, in consequence of said attachment, that the obligation should be void, otherwise to remain in full force and effect. The declaration then avers, that Hayes was, on the 5th day of October, 1841, summoned as garnishee in said cause, and all debts due from him to said Barnes, attached in his hands. The main breach is, that Ward did not prosecute his suit with effect, but, on the contrary, at the April Term 1845, of the United States Circuit Court, the attachment was dissolved, the suit dismissed, and Hayes, the garnishee, discharged; that by reason of the premises, Hayes was injured and had sustained damages to the amount of \$1,743, which Ward refused to pay. The declaration does not aver that Barnes, the plaintiff in the suit, had sustained any damage, by reason of any breach of the bond. The defendant, Webster, demurred generally, and the demurrer was sustained, on the ground that the declaration did not aver that Barnes, the plaintiff, had sustained any damages by the alleged breach of the bond, and that Barnes had no legal interest in the damages stated in the declaration to have been sustained by Hayes, and that neither Hayes nor Barnes could, in this form, if in any, recover such damages on the bond.

*E. Bates*, for plaintiffs in error.

In view of the record, the ground upon which the Court of Common Pleas sustained the demurrer, is not a construction of the bond, for that is plain and admits of but one meaning; but it presents the question, whether or not the obligor could legally make such a bond, or the obligee receive it; and the court, in effect, decided that Webster and Barnes could not contract, the one to pay and the other to receive such damages as Hayes, the garnishee, might suffer by reason of the attachment. It is hard to conceive of a law denying the power of the parties to make such contract, and if they could legally make it, the court must, of course, enforce it according to its terms. The breaches are the exact negatives of the language of the condition, and therefore, on the demurrer, which admits the facts as stated, there can be no objection, but to the legal

validity of the bond, or the condition itself. I assume, that it is the right of every free man to bind himself in any contract, that is not either wrong in itself, forbidden by law, or injurious to some other person; and this bond is neither. It is a bond volunteered by Webster, to advance the ends of an attachment suit, in which he had no concern, but in which Barnes was defendant and Hayes garnishee. The suit was pending in the federal court, and it may fairly be inferred, (and, in fact, it was so,) that the bond was given under the circumstances, and by analogy, to the like proceedings in the state courts, under our statute. Rev. Code 1835, Attachment, article 1, section 38. There is no act of congress regulating suits by attachment, nor giving jurisdiction of attachment cases; and therefore, unless the federal court has jurisdiction of the person of the defendant, it cannot entertain the attachment of his property. See 12 Pet. Rep. 300, *Toland v. Sprague*; which is recognized in 15 Pet. 167, *Levy v. Fitzpatrick*. The attachment suit, in which this bond was given, was held on for several terms, to get personal service on the defendant, but failing in that, the attachment was dissolved and the suit dismissed. If it be urged here, as below, that the law required no bond in this case, I answer, that a voluntary bond is, at least, as good as a bond made under compulsion of law or duress of fact. Every security in a bond is a volunteer; and that is not only so among private persons, in their ordinary business, but applies equally to the government and its agents. See 5 Pet. Rep. 115, *United States v. Tingey*. A bond voluntarily given to the United States, and not prescribed by law, is a valid instrument. And this case is recognized in 10 Pet. Rep. 343, *United States v. Bradley*. And this principle is constantly acted on, and carried out in practice, in the circuit and district courts of the United States. See 4 Wash. C. C. R. 620, *United States v. Howell*—to the effect, that officers of the government may, without any law, take security from the debtors of the public. Again, Gilpin's D. C. R. 561, ——— v. *Rice*—to the effect, that the Post-

master General has a right to take bonds from his deputies, although not required by law. And again, 1 Gallis. C. C. R. 476, a voluntary bond given upon the delivery of property to a claimant, on his application, is good, although the condition does not conform to the statute.

*Geyer & Dayton*, for defendants in error, submit the following propositions :

I. The declaration shows no cause of action in favor of the plaintiff against the defendant. The bond sued on is a penal one, and the penal sum, in case of a breach, though the limit, is not the measure of damages. The obligee can recover only such damages as he has actually sustained by a breach. The declaration, in this case, does not aver that the plaintiff had sustained any damages from any breach of the bond, or that he had any legal interest in the damages, stated to have been sustained by Hayes, the garnishee. It is, therefore, bad, unless it is authorized and can be maintained under the provisions of our statute concerning penal bonds.

II. The declaration is not aided by statute. The act of 1835, in force when the bond sued on was made, and the act of 1845, are identically the same, so far as they relate to this question. Each of these statutes provides, that suits on certain classes of bonds can be brought in the name of the obligee, to the use of the party injured, but only in cases where, by the law of this state, such party is authorized to prosecute a suit to his own use on the bond. See secs. 15 and 28, act of 1835, p. 432-3, and secs. 15 and 28, act of 1845, p. 407-8. The bond in question is not under, in obedience to, or in conformity with any statute of Missouri, though it is claimed to be under the 38th section of the act of 1835, concerning attachments. Revision of 1835, p. 81. But that act, or any other, does not authorize a suit upon the bond mentioned in said section 38, in the name of the obligee to the use of the party injured. This bond is not of the class mentioned in the 28th section of the acts of 1835 or 1845, concerning penal bonds, and if it were, it is not within the

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provisions of the 15th section of said acts, because, by no law of this state is any person authorized to prosecute a suit to his own use upon such bond. We submit, therefore, that Hayes, the party claimed to have been injured, cannot, by virtue of our statute, maintain an action in the name of Barnes to his use on this bond, and that the declaration in this case derives no support from the statute. We do not understand the 28th section of the act concerning penal bonds to authorize, in respect to the bonds therein embraced, the person aggrieved to prosecute a suit in the name of the obligee to his use, except in three cases, when the statute, in providing for giving the bond, also provides, that any person aggrieved may prosecute a suit to his own use upon it. We contend, that suits on the bonds, embraced by the 28th section, are subject to the same restriction mentioned in section 15, in respect to official bonds.

The bond of an administrator must be to the state of Missouri, Rev. Stat. 1845, p. 35, sec. 15, article 1st of act concerning executors and administrators; also, the bond of an executor, sec. 17, same article and act, p. 36. The bond of an executor or administrator may be sued on, at the instance of the party injured, in the name of the state, to the use of such party. Section 8, article 7, of same act, p. 57, Rev. Stat. 1845.

The bond of a sheriff must be to the state. Section 3 of act concerning sheriff and marshal, p. 524, Rev. Stat. 1845. Any person aggrieved may have, in certain instances, his action against the sheriff on the official bond. Section 58 of act concerning executions, p. 247 of Rev. Stat. 1845.

Bond of a constable must be to the state. Section 2 of act respecting constables, p. 111, Rev. Stat. 1845. It may be sued on, at the instance of any person injured by its breach. Section 6, same act, p. 112.

Bond of recorder must be to the state. Section 5, act of 1845, p. 476, respecting recorder. May be sued on by party aggrieved in the name of the state, to his use. See same section and page of act of 1835; section 20 of act of 1845, p. 478.

Replevin bond is given to the sheriff, or other officer executing the writ. Section 5, act of 1845, concerning replevin, Rev. Stat. 1845, p. 479. The bond may be sued on in the name of the officer, to the use of the party injured. Section 14, same act, p. 480.

The bond to be given by a plaintiff, under the act of 1845, concerning attachments, must be to the state of Missouri. Section 4 of said act, Rev. Stat. 1845, p. 74. This bond may be sued on at the instance of any party injured, in the name of the state, to the use of such party. The bond to be given by the plaintiff, under the attachment act of 1839, was to the state, (laws of 1839, p. 6, sec. 3,) but does not authorize suit in this form.

The bond of notaries public to be to the state. Rev. Stat. of 1845, section 7. May be sued on by any party injured, section 8.

The bond sued on, not being a statutory one, or within the provisions of the statutes aforesaid, cannot be sued upon, in the form adopted, for any damages but such as were sustained by the plaintiff, and as none are alleged to have been sustained by him, the demurrer was properly sustained.

All the above considerations are also urged in the case of *United States* to the use of *Hayes v. Ferguson*. The following further point is also made: that a bond in terms to the United States, and for the purposes indicated in the one in question, is not valid and binding, not being executed in pursuance of any law, nor in connection with any business of the United States, or any duty of the obligor to the United States. No one was authorized to accept such a bond for the United States, and therefore, there was not, and could not have been any delivery to the United States, a fact essential to the validity of a bond.

SCOTT, Judge, delivered the opinion of the court.

1. By the common law, when a bond was given for the payment of money, with a defeasance to be void upon the performance of a collateral undertaking, if there was a breach of

the condition, the whole penalty was forfeited and might be recovered in an action on the bond. Courts of chancery, however, whose province it was to relieve against forfeitures, would restrain the collection of the penalty and compel the plaintiff to receive such damages as he had actually sustained. The statute of 8 and 9 of William III, dispensed with the necessity of resorting to chancery, by requiring the plaintiff to set out the breaches and show the damages occasioned thereby. Judgment was entered for the penalty, and a memorandum was endorsed on the execution, that it might be discharged by the payment of the damages assessed and the costs. The judgment remained, as a security for the future breaches of the condition of the bond, the remedy for which was enforced by *scire facias toties quoties*, until the penalty of the bond was exhausted. This statute extended to those bonds only, in which the obligee himself was injured by a breach of the condition. The provision with respect to official and other bonds, by the breach of the condition of which, others than the obligee might be injured, was an extension of the terms of the statute of 8 and 9 of William III. At common law, if A. covenanted with B. to pay C. a sum of money, B., for the use of C., may maintain an action on this covenant. 3 Chit. *Robbins v. Ayers*, 10 Mo. Rep. Under the equity of the statute, the obligee is regarded as trustee for those who may sustain an injury by the breach of the condition, as it is supposed that the collection of the penalty, which is forfeited by the breach, would, in a court of equity, be restrained only by the payment of the damages sustained by him, for whose use and benefit the bond was given. In the case of *McRea v. Evans*, 2 Dev. 383, it was held, that a bond given to a trustee with condition to secure the rights of others, may, at common law, be put in suit in the name of the trustee, and an injury to a *cestui que trust*, assigned as a breach. That the act authorizing official bonds to be put in suit, by persons injured by the misconduct of the officers, without an assignment, is an affirmance of the common law, and although coroner's bonds are not mentioned in



it, they may be sued on in the same manner. To the same effect is the case of *Skinner v. Phillips*, 4 Mass. Rep. 68. This last case is not impugned by that of the *Commonwealth v. Hatch*, 5 Mass. 193; for there it appears, that the bond was given for the sole use of the Commonwealth, and, of course, no one but her authorized agents could put it in suit. The rights of individuals were not designed to be protected by it, and, of course, they had no right to sue. The plaintiff is regarded as a trustee, for those who may be injured by a breach of the condition; they have a right to use his name in the prosecution of the suit, and as the obligors could only get relief, at common law, by paying the damages actually sustained by the breach, so, on the forfeiture of the penalty, though the plaintiff has sustained only nominal damages, yet the defendant cannot be relieved, but by the payment of the damages which another may have sustained by breach of the condition of the bond made for his use and benefit. In other words, the plaintiff sues for the benefit of those for whom the bond was given as an indemnity, and the case, if not within the letter, is within the spirit of the law. This determination has not been made without an examination of the cases of *Pickering v. Fisk*, 6 Ver. 104. *Spencer v. Watkinson*, 11 Conn. 1. *White v. Wilkins*, 24 Maine, 299.

2. It is needless to cite authorities that this bond, although voluntary, and not authorized by any statute, is good as a common law bond. All bonds, though voluntary, if they do not contravene public policy, nor violate any statute, are valid and binding on the parties to them.

3. As regards the case in which the United States is the obligee and plaintiff, we do not see the force of the objections, that a bond to the United States, for the purposes indicated in that one, is not valid, not being executed in pursuance of any law, nor in connection with any business of the United States, or any duty of the obligor to them; and that, no one being authorized to accept the bond, there could be no delivery of it. In the multiplied transactions of the government of the United

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States, in both the executive and judicial departments, many cases occur, in which it is deemed necessary and prudent to take bonds, though there is no statute authorizing them. In all such cases, it is very convenient to make the bonds payable to the United States, as, thereby, many delays are prevented and intricate questions avoided, which would arise upon bonds payable to individuals or officers, by reason of deaths, successions, &c. The United States are not liable for costs, and no evil can arise from this practice. The process of foreign attachment can be issued by the Circuit Courts of the United States, in cases where the defendant is found within the district in which the process issues, so that it can be served upon him. In analogy to the practice which prevails in this state, bonds may be given before the process issues. Such bonds would stand upon the same footing as the bonds in the cases of the *United States v. Tingey*, 5 Pet. 115. *United States v. Bradley*, 10 Peters, 343. *Postmaster General v. Rice*, Gilpin's Rep. 561. *Postmaster General v. Norvell*, ib. 120. In all these cases, the acceptance of the bond was presumed, although there was no law authorizing the officer to take them.

Judge Ryland concurring, the judgment is reversed, and the cause remanded. Judge Gamble not sitting.

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BLOSS, Appellant, vs. STEAMBOAT ROBERT CAMPBELL, Respondent.

1. Under the fourth subdivision of the first section of the act concerning boats and vessels, (R. S. 1845,) an action cannot be maintained against a boat, for damages sustained by a hand, in being forced ashore by the master, in breach of a contract of hiring.

*Error to St. Louis Circuit Court.*

John Blass, the appellant, brought suit in the St. Louis Circuit Court, against the steamboat Robert Campbell, under the statute concerning boats and vessels, for damages for injuries done to the appellant. The facts, as presented by the complaint, are substantially as follows: On the 31st day of June, 1851, the defendant, lying at the port of St. Louis, bound for

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the mouth of the Yellow Stone river, through one Eads, her master, employed the plaintiff, as a hand, to go to said Yellow Stone and back to St. Louis, for certain wages then agreed upon between the said parties. The plaintiff shipped on board the defendant, under said hiring, as aforesaid. After the boat had been several days out on said trip, the plaintiff got sick, and whilst so sick, the defendant unlawfully and unjustly forced and compelled the plaintiff to go ashore at a place belonging to the Gros Ventres nation, a tribe of Indians, and at a place where he was compelled, without any money, or means of sustaining himself, to stay for a long time among the Indians, to his great pain, injury and damage; all of which happened within six months before the said suit was brought. To this petition, defendant demurred, which demurrer the court sustained, and judgment was rendered for the defendant. Plaintiff brings the case into this court by writ of error.

*H. N. Hart*, for appellant.

The complaint clearly sets out facts sufficient to constitute a cause of action against the defendant, under the boat and vessel act, according to the fourth subdivision of the first section of said act. See boat and vessel act, sec. 1, subdivision 4, Rev. Code, 1845.

RYLAND, Judge, delivered the opinion of the court.

From the statement of the case, we are of opinion that the demurrer to the plaintiff's petition was properly sustained in the court below. The last clause of the fourth subdivision of the first section of the act concerning boats and vessels, reads: "and for damages for injuries done to persons or property by such boat or vessel." The plaintiff contends that the breach of the contract of hiring by the captain, in forcing the boat hand to go ashore, and leaving such hand, is within the clause above quoted. We think not. The clause was designed to embrace injuries, in which the boat was an agent, such as collisions and the like. Let the plaintiff sue the person who hired him, and who broke the contract. The judgment below is affirmed, the other judges concurring.

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McMartin v. Adams.

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## McMARTIN, Appellant, v. ADAMS, Respondent.

1. A petition, which states that the defendant "made his note, and thereby promised to pay," &c., is sufficient, although the note, on its face, appears to have been executed by the defendant, as attorney for other parties. Under this allegation, the plaintiff may prove such facts as make the defendant personally liable.

*Appeal from St. Louis Circuit Court.*

No further statement of the case is necessary, than is contained in the opinion of the court.

*McMartin & Holmes*, for appellant.

The allegation that the defendant "made his note by the style of J. H. & W. R. Adams, by W. F. Adams, attorney, and thereby promised," &c., is sufficient in law, if true in fact, to charge the defendant as maker. The meaning of these words is matter of evidence. 2 Smith's Lead. Cases, 307. On a note so signed, the pretended agent will be individually liable, if he, in fact, have no principal; and this is matter of evidence. Story's Agency, § 264, 264 *a* and notes. 2 Smith's Lead. Cases, 303, 307. Chitty on Con. 227 and notes. Paley on Agency, by Dunlap, 387 and notes. *Dusenbury v. Ellis*, 3 Johns. cases, 70. *Rossiter v. Rossiter*, 8 Wend. 494.

*Todd & Krum* and *Harding*, for respondent.

The note sued on was signed in the exact manner pointed out by the law, when an agent wishes to bind his principal and not himself; and the agent cannot be made liable upon an instrument executed in such manner, unless facts, outside of the instrument, and sufficient to create such liability, are alleged to exist. 12 Mo. Rep. 488. Story's Agency, § 263. Under the new code, the petition should apprise the defendant of the ground on which he is sought to be charged, so that he may not be surprised.

GAMBLE, Judge, delivered the opinion of the court.

The petition of the plaintiff alleged that the defendant "made his certain promissory note in writing, by the name and style of J. H. & W. R. Adams, by W. F. Adams, att'y, by

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him subscribed thereto, and thereby, then and there promised," &c. A demurrer was filed to this petition, and was sustained by the Circuit Court. It is insisted, in support of the demurrer, that, by the note, as it is alleged to have been executed by the defendant, he did not bind himself, as a principal, but that he is to be taken to have executed the note as an attorney, unless the fact is averred in the petition, either that he was a partner in the firm of J. H. & W. R. Adams, or that, professing to act as attorney, he acted without authority. It is a sufficient answer to this objection to the petition, that it expressly charges that he "made *his* promissory note," and that "*he* thereby promised." The burden of showing that the note bound him as principal is upon the plaintiff, unless the defendant, when he comes to answer, is constrained to admit the fact. The charge is sufficiently clear to require him to answer. The demurrer was improperly sustained. Let the judgment be reversed, and the cause remanded.

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LITTLE, Respondent, *vs.* SELICK and others, Appellants.

1. Causes cannot be taken by writ of error or appeal from the Law Commissioner's Court of St. Louis county, to the Circuit Court, but only to the Supreme Court.

*Appeal from St. Louis Circuit Court.*

*Blennerhassett & Shreve*, for appellants.

I. The appellants insist that the cause was not liable to be tried, or rather that it should not have been tried at the March term, to which it was returnable.

It has been the invariable practice of the courts of record of this county, and of the Circuit Court, not to try causes appealed, at the return term, unless the appeal was perfected on the day of the trial, or the appellant gave notice, in writing, to the party, of his appeal, and the appellee filed his appearance on

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or before the first day of the return term. Rev. Stat. 1845, p. 671, sections 21 and 22.

II. The appellants contend, that if this case could have been tried at the March term, it should have been *de novo*. Rev. Stat. p. 670, sections 13, 18 and 19. Act of 1851, concerning Law Commissioner, third subdivision of section three.

*Glover & Campbell*, for respondent.

The eighth section of the act making the Law Commissioner's Court a court of record, approved February 17th, 1851, provides that "The Circuit Court of St. Louis county shall only have the same control and jurisdiction over said Commissioner's Court, that it has over the St. Louis Criminal Court," &c.

The act establishing the Criminal Court of St. Louis county, approved March 15, 1845, (see Rev. Code, 1845, chap. 43,) provides, in the fifth section thereof, that "The Circuit Court of St. Louis county shall exercise superintending control over the said Criminal Court, only by appeal or writ of error, allowed and prosecuted in the manner and with the effect prescribed by law in cases of appeals or writs of error to the Supreme Court, except that the defendant shall in no case be let to bail on such appeal or writ of error."

The act entitled "an act to regulate proceedings in criminal cases," approved March 25th, 1845, in article six, section twenty-four, provides that "on the trial of any indictment or prosecution for a criminal offence, exceptions to any decision of the court may be made in the same cases and manner provided by law in civil cases, and bills of exception shall be settled, signed, sealed and filed, as now allowed by law in personal actions, and the same proceedings may be had to compel or procure the signing and sealing of such bills, and the return thereof, as in civil cases." (See Rev. Code of 1845, page 881, section twenty-four of Practice in Criminal Cases:)

It follows, then, from these several provisions, that the ap-



peal from the Law Commissioner's Court could only be by bill of exceptions. There being no bill of exceptions, no record filed in the Circuit Court, when the case was regularly reached, in its course on the docket, on motion of the appellee, the Circuit Court could only do what this court would have done in like circumstances, to-wit, affirm the judgment of the Law Commissioner.

The appellant relies on the language in the third section of the Law Commissioner's law, in the third specification of powers. This language is alleged to authorize the Circuit Court to try causes of this class, as it tries cases coming up from justices of the peace; but no fair interpretation will justify any such idea. The words are, "that govern *trials* in like cases before justices of the peace." Trials are ended, when the judgment is rendered. It is difficult to imagine how trials can be made to comprehend appeals.

But we are not left to mere rules of construction. The act itself expressly sets out how and to what court appeals shall be taken. Section nine provides that "cases may be taken from said Commissioner's Court, by appeal or writ of error, to the Supreme Court, under the same rules and regulations that cases are taken to the Supreme Court from the several Circuit Courts," which section immediately succeeds that authorizing appeals to the Circuit Court; thus clearly describing the tribunals that should be the appellate courts of the Law Commissioner's Court; and in what manner cases shall be carried to said courts, so as to give them jurisdiction of the same.

RYLAND, Judge, delivered the opinion of the court.

This was originally an action of forcible entry and detainer, brought by Little against Sellick and others, in the Law Commissioner's Court.

The plaintiff had judgment and the defendant appealed to the Circuit Court. The plaintiff, the appellee, entered his appearance to the appeal in the Circuit Court, and moved the court to dismiss the appeal for want of jurisdiction; and also, that if the court had jurisdiction, the case was not properly

before that court, there being no bill of exceptions, showing the evidence and action of the court below.

The Circuit Court overruled this motion. The appellants objected to the case being taken up for trial at the first term, alleging that they had given the plaintiff, the appellee, no notice of the appeal. This objection was overruled; the appellee had already entered his appearance. The defendants then moved, that if the court would take up the cause at the present term, a jury should be impanelled to try the case anew. This motion was also overruled. The appellee then moved the Circuit Court that the judgment of the Law Commissioner's Court be affirmed, which motion the court sustained. The appellants excepted and bring the case here by appeal.

1. In the opinion of this court, the Circuit Court erred in refusing to sustain the appellee's motion to dismiss the appeal for want of jurisdiction. By the ninth section of the act concerning the Law Commissioner of St. Louis, approved February 17, 1851, "cases may be taken from said Commissioner's Court, by appeal or writ of error, to the Supreme Court, under the same rules and regulations that like cases are taken to the Supreme Court from the several Circuit Courts; and cases taken to the Supreme Court from the said Commissioner's Court, shall be heard and determined in the same manner and under the same rules and regulations that like cases are heard and determined therein from the several Circuit Courts."

This Commissioner's Court has exclusive jurisdiction over all appeals in civil cases from justices of the peace, within the city and county of St. Louis, in like manner as the Circuit Courts in this State had in other counties, except as in the aforesaid act is otherwise provided.

Cases, then, originally before the Law Commissioner, or brought to his court, by appeal from justices of the peace, may, by appeal or writ of error, be brought to the Supreme Court, but not to the Circuit Court.

Permit the parties to appeal to the Circuit Court from the

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Blair, Guardian of the heirs of Mageniz, v. Smith.

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Law Commissioner, and there try the case anew, and in cases taken to the Commissioner's Court from the justices of the peace, there would be two trials *de novo* upon the merits, in two different appellate courts. Litigation is stretched out now far enough for any practical purpose, without having three courts to which parties may appeal consecutively, the two first of which are required to try the case *de novo*. Begin before a justice of the peace, go by appeal to the Law Commissioner, from him by appeal to the Circuit Court, and lastly to the Supreme Court! The statute, allowing appeals and writs of error from the Law Commissioner's Court to the Supreme Court, never contemplated allowing such to the Circuit Courts. It is of the utmost importance to the citizens of this State, that the courses of litigation should be as short as practicable. Let justice be brought home to the doors of every man, as speedily as can, with convenience, be done. Let there be no needless and useless round of traveling from court to court.

The other Judges concurring, the judgment of the Circuit Court is reversed and the cause remanded, with directions to set aside the judgment of affirmance and to dismiss the appeal.

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BLAIR, GUARDIAN OF THE HEIRS OF MAGENIS, Plaintiff in Error, vs. SMITH, Defendant in Error.

1. The acceptance of a deed is not such a recognition of the title of the vendor, as to estop the vendee from availing himself of a possession adverse to that title, under the statute of limitations.
2. Adverse possession for twenty years confers upon the possessor an absolute title against all persons not excepted by our statute of limitations.
3. Where the owners of contiguous lots mutually establish a boundary line and build up to it, and use and occupy according to it, for a period long enough to show their agreement and acquiescence, although less than the period which would be a bar under the statute of limitations, they, and those claiming under them, will be estopped from afterwards claiming a different boundary. *Taylor & Mason v. Zepp*, 14 Mo. affirmed.
4. This principle is not in contravention of the statute of frauds.

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*Error to St. Louis Circuit Court.*

This was ejectment for a small strip of ground fronting on Front street, in St. Louis, described in the petition as being two feet seven inches in width on Front street, against Smith, a tenant of John H. Gay, brought in November, 1849. The answer sets up the statute of limitations and also, that the division line had been agreed upon and possession had according to it, for a long time, by the owners of the contiguous lots, and that the plaintiffs were bound by such agreement, possession, acquiescence, &c.

The facts appeared on the trial to be, that Gay acquired by deed from Sarpy, and others, on the 18th of April, 1828, a lot of ground at the corner of Chesnut and Front streets, bounded south by Chesnut street. Gay immediately entered into possession, and commenced building a warehouse in the fall of 1828, which was finished in the summer of 1829, and was built on what he claimed to be the north line of his lot, which said lot was bounded north by the lot of A. L. Mageniz. Gay held possession of the same up to the great fire of 1849, when said warehouse (stone warehouse,) was consumed, and the same lot was leased to Smith, who commenced moving the old walls of said warehouse and rebuilding on the same lines and covering the same ground occupied by the north wall of said warehouse. At the time of the purchase from Sarpy and others by Gay, there was, along the north boundary of their lot, a vacant space used as a private alley, and he, Gay, was informed by Sarpy that the same belonged to the owners of the lots on each side, and was at their disposal; and upon this information, said warehouse was built, so as to take in half of said private alley. After said warehouse was built, Mageniz laid claim to seven feet of the land, and in August, 1830, Gay purchased from Mageniz, for \$700, his right, and took a warranty deed of that date for seven feet, described in the deed as containing seven feet English measure in front, by eighty feet same measure in depth, be the same more or

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less, &c., bounded east by Water street, south by lot of Gay, north by lot of Magenis, and west by alley.

In 1832, said Magenis, the ancestor of the plaintiffs, built a warehouse on his lot and used the north wall of Gay for the south wall of his warehouse, and paid Gay therefor the sum of one hundred dollars. Magenis resided in St. Louis during all these transactions, till his death, in 1848, and during all that time, Gay held the uninterrupted and peaceable possession of his said warehouse and lot, claiming the same; and such possession was continued till the commencement of the suit.

The land claimed is twenty-three inches, being the difference between thirty-one feet French, and thirty-one feet English measure. Magenis also occupied his building all that time.

The court gave and refused instructions based upon the principles that the statute of limitations was a bar to the action, and, *secondly*, that if the owners of the adjacent lots agreed upon a division and boundary line, separating the two lots, and built respectively upon said line, and occupied accordingly, from thence down to Magenis' death, in 1848, each up to his line, then, that the parties are bound by said line, and all claiming under them; and, *thirdly*, that the acceptance of the deed of Magenis, by Gay, in 1832, does not estop Gay from setting up a previous possession against Magenis and his representatives, under the statute of limitations.

The court, sitting as a jury, found a verdict for defendant.

*M. & F. P. Blair*, for plaintiffs in error.

1. As to limitations, the plaintiffs insist that the record shows that the possession of the defendant's lessor was not adverse, for twenty years prior to this suit.

2. As to the fixing of boundaries, the plaintiffs insist that there is no evidence whatever to show it; and especially, no acts of a character to operate as an estoppel to claim the true boundaries. 3 Hill, 219. *Taylor & Mason v. Zepp*, 14 Mo. Rep. *Rockwell v. Adams*, 16 Wendell, opinion of senator Maison.

*Spalding & Shepley*, for defendant in error.

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I. The adverse possession of Gay and those holding under him, is an effectual bar to the plaintiffs' action. 13 Mo. Rep. 335, *Biddle v. Mellon*. Angell on Limitations, chap. 31, section 14-19. 1 Watts, 433. 5 Serg. & Rawl. 236. 2 Har. & J. 87. 1 Bibb, 582. 2 Bibb, 506. 4 Bibb, 100. 4 Monroe, 138. 8 Peters, 41. 9 Mo. Rep. 477.

II. Purchasing out and taking deed from Magenis, of the seven feet, is no admission of Magenis' right to the ground now under dispute, so as to prevent the defendant from setting up the bar of the statute of limitations. 12 Mo. Rep. 238, *Landes v. Perkins*. A person in possession, claiming title, may purchase in an outstanding title, and is not thereby deprived of the benefit of his previous adverse possession; nor is he thereby estopped from denying the validity of the title so purchased. 9 Mo. Rep. p. 477, *Macklot v. Dubreuil*. 11 Mo. Rep. 118, *Joeckel v. Easton*. 11 Mo. Rep. 149, *Page v. Hill*. These cases establish the doctrine that the vendee is not estopped from denying his vendor's title.

III. The plaintiffs are estopped in this case. It is a question as to boundary. They now claim between one and two feet, which their ancestor had not claimed, but which, on the contrary, had for the greater part of twenty years, been covered by Gay's stone wall, forming the north side of his warehouse, while he himself had occupied the adjacent lot up to that wall, and had purchased the right of Gay to use and build against it. The wall formed the south side of Magenis' warehouse. 6 Wend. 467. 4 Wheat. 513. 10 Wend. 104. 12 Wend. 127. 13 Wend. 536. 4 John. 202. 2 Caines, 197. 1 Binney, 215. Barr, 234. 1 Yerger, 116, 496. 1 Meigs, 63, 413. 4 Yerger, 456. 8 Yerger, 398. 4 Metcalf, 438. 9 N. H. 473. These cases sustain the principle that, if neighboring proprietors fix on a boundary line and act accordingly, and possess according to it, especially, if they get the line run by a surveyor and agree upon it, it is an estoppel, and they are both bound by it, and possession, according to a line, is evidence of an agreement establishing it.



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The case of *Taylor & Mason v. Zepp & Zepp*, decided at the last March term, is exactly in point.

RYLAND, Judge, delivered the opinion of the court.

From the above statement, it will be seen, that this case comes fully within the principles and rules settled by this court in the case of *Taylor & Mason v. Zepp & Zepp*, 14 Mo. Rep. 482.

Here were proprietors of contiguous lots. One built a warehouse in 1828 and '29, more than twenty years before this suit was commenced. After putting up the warehouse, the other proprietor claimed that the warehouse had been built upon his ground. It seems that there was a private alley between the lot purchased by Gay of Sarpy and others, and the lot of Mageniz. This alley, Gay was informed, was for the benefit of, and belonged to the owners of these two lots—his lot and Mageniz' lot. Gay then commenced his warehouse so as to take his part of this alley; the north wall of the warehouse he supposed to be on his line. After the warehouse had been erected, Mageniz complained that Gay had overreached on him, and that his warehouse was, in part, on his lot. Gay then bought of Mageniz a strip of land on the north of Gay's lot, seven feet wide, and eighty feet in length, running from Front street back to the alley, now Commercial alley. For this strip of land, Gay paid Mageniz \$700, and took a deed from Mageniz, with covenants of general warranty. Mageniz afterwards erected a warehouse joining the warehouse of Gay, and used Gay's north wall of his warehouse in common. For the use of this wall, Mageniz paid Gay \$100. Gay and those under him had been in possession, from the purchase in 1828. He purchased the seven feet from Mageniz in 1830. Gay remained in possession up to the big fire in 1849, when this warehouse was burned. Gay then leased the lot to Smith, the defendant, who commenced building on the site of the old wall, between Gay and Mageniz. The plaintiffs are heirs of Mageniz; their ancestor resided in St. Louis,

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from the time of the building of the warehouse until his death in 1848, never claimed any part of the lot from Gay, and used with Gay, in common, the wall of the warehouse as his southern boundary, and Gay used it as his northern boundary. It was supposed, at the time of the purchase by Gay from Magenis, that the wall on the north side of the warehouse was the line. The lot was sold, as having that line of boundary for Magenis' south and Gay's north line. The plaintiffs claim twenty-two inches in width, running the entire length back, being eighty feet. The plaintiffs now allege that this strip of land was never embraced in Magenis' deed to Gay, and that they were entitled to it. The suit was commenced November 2d, 1849. Gay bought the seven feet of Magenis, in August, 1830.

The plaintiffs asked the court to declare as follows: "As Gay accepted the deed from Magenis, dated August, 1830, and shows no other title, he thereby admitted Magenis' title, and had not therefore held adversely for twenty years, at the institution of this suit; the court is therefore bound to find for the plaintiffs;" which the court refused to give, and the plaintiffs excepted.

The defendant then asked the following instructions:

1. If Gay and Estes took possession of the ground in dispute, under claim of title, in the spring of 1828, and they and those deriving title and claiming under them have held actual and continued possession ever since, down to the commencement of this suit, adversely to all other persons, and if, when said possession commenced, Arthur L. Magenis resided in St. Louis and continued to reside there till his death in 1848, then the plaintiffs are barred by the statute of limitations and cannot recover in this action.

2. If Arthur L. Magenis and Gay and Estes were the owners of adjoining lots of ground in St. Louis, in the year 1828, and if they, then or soon thereafter, agreed upon a division and boundary line, separating said two lots, and afterwards built

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upon said line respectively and occupied said lots according to said line, from thence continually down to the time of said Magenis' death in 1848, the owner of each possessing his lot up to said division line, so agreed upon and established, the said parties and all claiming under them are bound by said line and are not permitted to dispute its correctness, in the absence of fraud.

3. The acceptance of the deed from A. L. Magenis by John H. Gay, does not estop said Gay and those claiming under him from setting up a previous possession against said Magenis and his representatives, under the statute of limitations.

These three instructions were given by the court. The plaintiffs excepted thereto. The court, sitting as a jury, found for the defendant. Motion for a new trial being overruled and exception taken, the plaintiffs bring their writ of error.

This case is fully within the principles of the above case of *Taylor & Mason v. Zepp & Zepp*, and we might rest satisfied by merely affirming the judgment in pursuance of that case. But we will go further and investigate these questions and settle them as far as practicable.

1. The doctrine contended for, and set forth in the plaintiffs' instruction, was properly overruled by the court below. This court has so often decided against that doctrine, that we did not expect to see it contended for again. See *Landes v. Perkins*, 12 Mo. Rep. 238, particularly page 258, where this court has decided, most emphatically, against this doctrine. So also, in *Macklot v. Dubreuil*, 9 Mo. Rep. 484. So also, in *Joeckel v. Easton*, 11 Mo. Rep. 124. So also, in *Page v. Hill*, 161, same volume.

The doctrine of the instructions for the defendant will now be noticed. The third instruction is the converse of the one asked by the plaintiff and refused. It was proper, therefore, for the court below to give this instruction. The authorities cited from the reports of decisions made by this court, fully justify the court in the ruling on this point.

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2. As to the defendant's first instruction, the doctrine sought to be applied has been settled by this court. In *Biddle v. Mellon*, 13 Mo. Rep. 335, it was decided that adverse possession for twenty years confers upon the possessor an absolute title, against all persons not excepted within the terms of our statute of limitations. In *Macklot v. Dubreuil*, 9 Mo. Rep. 477, it was held by this court, that the vendee could dispute the title of his vendor, in an action of ejectment: his possession is adverse to that of his vendor, and he may set up the statute of limitations, in bar of the action founded on his vendor's title.

In *Layson v. Galloway*, it was held by the Court of Appeals of Kentucky, 4 Bibb, 100, that twenty years actual, adverse, uninterrupted possession will bar the action of ejectment.

In *Pederick v. Searle*, 5 Serg. & Rawle, 236, the Supreme Court of Pennsylvania held, that twenty-one years continued adverse possession gives a title to land, which is valid not only by way of defence, but sufficient to recover upon in ejectment.

In *Gay v. Moffitt*, 2 Bibb, 506, it was held, that a mere naked possession, if adverse and hostile, would bar an ejectment.

In the opinion of this court, there is no error in the court below, in declaring the law as it did in the first instruction.

3. We now come to the second instruction given by the court below, which may be considered as involving the main question in this case. This question was met and decided in the case of *Taylor & Mason v. Zepp*. We will, however, review this question, so as to put it to rest for the time to come in our courts.

We consider the plaintiffs estopped in this case. It is a question as to boundary. They now claim between one and two feet, which their ancestor had not claimed, but which had, on the contrary, for a greater part of twenty years, been covered by Gay's stone wall, forming the northern side of his warehouse, while he himself had occupied the adjacent lot up to that wall, and had purchased the right of Gay to use and

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build against the wall. The wall formed the boundary line between the two ; it was Mageniz' south boundary and Gay's north boundary. This wall, thus forming the boundary line, shall be considered, when thus used, as the agreed line between these contiguous owners and occupiers. It is competent for two such proprietors to agree to what shall be the division line ; and when using and occupying up to such a marked line as this, such use and occupancy shall be considered and deemed evidence that such line was agreed to be the division by and between the owners. The statute of frauds does not touch such a case as this. Here there is no sale of the land to either party. There is no consideration passing from one to the other ; it is not a contract either of buying or selling land from one to the other. They own adjacent lots — contiguous lots ; they agree that such a marked line shall be the dividing line between the lots which they own ; and they use and occupy the respective lots up to this line, not for twenty years, not for fifteen years, but for a length of time sufficient to show the understanding and the intention of themselves — to show that they know their own boundary, that they are content with their own boundary.

We consider this case thus : two owners of contiguous lots or tracts of land, each having his deed for his lot or tract, agree with each other, " we fix this mark on the earth's surface as the line called for in my deed — this mark as the line called for in your deed : here is the line between us. My land, mentioned in my deed, comes up to this mark, or this fence, or this wall, on this side, and your land comes to the same, on that side." They use and possess and occupy their respective lots to this mark. Now, this use and occupancy, without disturbance, for a time long enough for men to show that they know the boundary between their lands, shall be considered binding and conclusive as to such boundary, as well as of such understanding or agreement between them. They shall not, after a lapse of years, longer or shorter, as the circumstances may tend to show their agreement or settlement, or the fixing

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of their common boundary, be permitted afterwards to dispute it. Such boundary, thus agreed upon, shall be considered the true one; and each one considered as the owner of the land mentioned in his deed thus marked out to that boundary between them.

4. The statute of frauds does not interfere in such a case.

The case of *Adams v. Rockwell*, 16 Wend. 285, was considered by this court in the case of *Taylor & Mason v. Zepp*, and the opinion of senator Maison therein does not meet the approbation of this court.

In the case of *Boyd v. Graves*, 4 Wheat. 513, the Supreme Court of the United States decided, that "The court cannot consider the agreement of the parties, although by parol, to settle the dividing line between them by a surveyor, mutually employed, as affected by the statute of frauds, as is contended by the counsel for the plaintiff. It is not a contract for the sale or conveyance of lands. It has no ingredient of such a contract. There is no *quid pro quo*, and the court do not consider it as the conveyance of title from one person to another. It was merely a submission of a matter of fact, to ascertain where the line would run on actual survey, beginning at a place admitted and acknowledged by the parties to be a boundary, where the line must begin. The possession subsequently held, and the acts of the parties evidenced by their respective sales of parcels of the land held by each, under his patent, bounding on the agreed line, amount to a full and complete recognition of it; and, in the opinion of this court, precludes the plaintiff, after such a lapse of time, from denying it to be the dividing line between him and the defendants, and neither ought now to be permitted to disturb the possession of the other, under a pretence that the line was not correctly run."

In the case in 1 Yerger, 118, the *Heirs of Houston v. Matthews*, Judge Haywood, speaking of agreements about boundaries, says: "such agreement, being not a conveyance of land, but only an ascertainment of land already conveyed, need



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not be by deed ; and being not an agreement for the sale or conveyance of lands, is not put down in writing, or required to be in writing, by the statute of frauds. It stands independent of the law concerning modes of conveyance of lands, and the law for the prevention of frauds and perjuries ; an agreement supported by the rules of the common law, as they existed anterior to the passage of either statute or act of assembly ; and it is a much more satisfactory mode of settling boundary, and therefore to be encouraged, than testimony concerning the line described."

Upon this subject, a weight of authority has been cited by the counsel for the defendant, putting the question at rest, as we think.

Upon the whole of this case, then, it is our opinion that the judgment below should be affirmed, and such being the opinion of my brother Judges, it is accordingly affirmed.

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McKEE, Respondent, vs. ANGELRODT, et al., Appellants.

1. The assignee of a lease by way of mortgage is not liable to the lessor for rent, unless he enters into possession.

*Appeal from St. Louis Circuit Court.*

On the 19th day of April, 1849, McKee leased certain premises situated in St. Louis, to one Frederick Angelbeck, for a term of years. On the 18th day of April, 1851, Angelbeck assigned the lease in question to appellants, by way of mortgage, to secure appellants for certain advances by them made and thereafter to be made. McKee brought his suit to recover the rent due by the terms of said lease, which rent accrued after the date of the assignment by way of mortgage above mentioned. The suit was brought against Angelbeck, the lessee, and the appellants as assignees. Angelbeck, the

lessee, filed his answer, which, upon motion, was stricken out and judgment rendered against him for the amount claimed. Appellants filed a separate answer, setting up, amongst other things, "that the said lease was assigned to them only by way of mortgage, and that they have not now and never, at any time, have had any other assignment of the same, except as security by way of mortgage; and that the appellants had never at any time had possession of the leasehold premises." McKee moved to strike out the answer of the appellants and for judgment. The court sustained the motion; whereupon the appellants asked and obtained leave from the court to file a further and amended answer, by which they set up as a defence to the action, that the said leasehold premises were only assigned to them by way of mortgage, and that they had never had possession of the premises, and that before the attempted assignment to them by way of mortgage, and on the 7th day of January, 1850, the said Angelbeck had assigned and transferred the said lease to Switzer, Platt & Co., who, thenceforth, became the legal assignees of the same, and still continue the legal assignees of the same. McKee moved to strike out this answer and for judgment, for the following reasons:

1. That the appellants were estopped from denying that they are legal assignees of Angelbeck, having signed the agreement by which the assignment by way of mortgage was made.
2. That the appellants, having put upon record an answer, under oath, stating that they are assignees, cannot now put upon record an answer stating that they are not assignees, without informing the court, under oath, that Switzer, Platt & Co., intentionally received, unknown to them, and now claim to hold the residue of the term of years, created in said lease, by virtue of an assignment from Angelbeck to said Switzer, Platt & Co. previous to the assignment to appellants.
3. That the assignment from Angelbeck to Switzer, Platt & Co. does not purport to be a conveyance of the deed of lease and the term thereby created, but only of an uncertain and undetermined interest.

4. Because judgment was rendered in favor of the plaintiff on the first answer, and defendants ought not to be permitted to file another answer, until after motion granted for a new trial.

The court sustained the motion and gave judgment for the plaintiff, and the case is brought here by appeal.

*C. B. Lord*, for appellants.

I. The assignee of a lease, who takes such an assignment only by way of mortgage, and who has not taken possession of the premises before the mortgage has become forfeited, is not liable to the performance of the lessee's covenants.

Assignments by way of mortgages, being merely conditional, are not considered as an actual transfer of the property, but as a security only for money. *Eaton v. Jaques*, Douglas, 460. (See note, Woodfall's Landlord and Tenant, 357.)

If a lessee for years, with covenants to repair, assigns to J. S., by way of mortgage, and *J. S. never entered*, he will not be compelled to repair, though he had the whole interest in him. *Sparkes v. Smith*, 2 Vernon, 275.

The assignee is only liable in respect to his possession; he bears the burthen while he enjoys the benefit and no longer. Douglas, 184, 460. Woodfall's Landlord and Tenant, 348.

In the case of *Eaton v. Jaques*, Douglas, 455, it was determined, that a mortgagee, assignee of a term of years, should not be liable on the covenants in the lease, unless he had taken actual possession.

In *Williams v. Bosanquet*, 5 Com. Law Rep. 72, this doctrine was overruled, and it has since been held in England that the mortgagee is liable, although he never entered into possession, because he has the legal estate.

The decision in *Eaton v. Jaques* is quite as consonant to sound reason as the decision in *Williams v. Bosanquet*; at all events, the latter case can have no influence here; the liability of the mortgagee is put expressly on the ground of his having the legal estate. Whereas, here the legal estate is in the mortgagor, and the mortgagee has but a chattel interest. It

is on the strength of this last case that Chancellor Kent lays down the rule, that the mortgagee of the whole term is liable for payment of rent, whether he enter or not.

In the case, too, of *Williams v. Bosanquet*, the mortgage money was due and the mortgage had become absolute. (See 5 Com. L. R., opinion of Dallas, C. J., p. 77-8.)

*Again*, what privity of estate is there between lessor and assignee by way of mortgage, when the mortgage has not become absolute, and when the mortgagee has not taken possession and is not even entitled to the possession? In the case at bar, the assignee could not take possession until condition broken. There must be privity of contract or privity of estate; there was neither here.

The assignee must take the place of the assignor in *law* and in *fact*; in law, by taking the legal estate; in fact, by taking possession and receiving the rents and profits.

If the assignee assign over his term, he is not liable for the breach of any covenant, after such assignment. The privity of estate is gone. Douglas, 452. 2 Atkyns, 546. 4 T. R. 99. 8 ib. 61. 1 Bosanquet & Puller, 23. And the assignment will be good, though made to a beggar or to a person leaving the kingdom. Douglas, 764. 1 Bosanquet & Puller, 23. Woodfall's Landlord and Tenant, 350.

It is now, I believe, universally held, in law and equity, that the mortgage is a mere security for the debt, and only a chattel interest. The mortgagor continues the real owner of the fee. 4 Kent, 161. He has not the legal estate. Laws 1845, sections one and three, and following. In *Crinion v. Nelson*, 7 Mo. Rep. 466, it was decided that a mortgage deed, under our statute, was no more than a bond to pay money, and might be assigned by parol, and that a mortgage did not carry the legal estate as in England. See, also, *Robertson v. Campbell*, 8 Mo. Rep. 616.

In *Wallop & Griswold v. McKinney's heirs*, 10 Mo. Rep. 230, the court seem to have adopted the doctrine laid down in 1 J. J. Marshall, 257, but seem to hold that after the

mortgage has become absolute, the mortgagee may maintain ejectment, but not till after forfeiture.

In New York, it is held that the assignee, by way of mortgage, is not liable upon the covenants. *Astor v. Hoyt*, 5 Wendell, 603. All the right, title and interest must pass out of the lessee to the assignee. Now, when the mortgagor is the real owner, can all right, title and interest be out of him? *Walton v. Cronly's Administrator*, 14 Wendell, 63, opinion of Sutherland, Justice. We think, therefore, that the court below erred in striking out the first answer.

II. By the amended and further answer filed by leave of court, we show that we could not take the estate, though we had a nominal assignment of the lease, because there was a prior assignment, absolute upon its face, to Switzer, Platt & Co., yet the court below decided that we were estopped from showing that fact as a defence, and that is error.

1. It is contended that we are estopped by the recitals in the deed of assignment. We think not. When a recital in a deed is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument. *Dart's Vendors and Purchasers of Real Estate*, 254.

A general recital in a deed does not conclude a party. 5 Johns. Ch. Rep. 23, 26.

A recital in a deed founded in mistake, and untrue in fact, will not be allowed to operate by way of estoppel to exclude the truth satisfactorily shown to the court. *Stoughton v. Lynch*, 2 Johns. Ch. Rep. 209. In most of the cases where recitals are held to estop, it will be found that what is said to be recital, is so mixed up with the operative parts of the deed, that the estoppel will generally be found to refer to those parts rather than to matter of recital.

2. We surely are not precluded from showing the real nature of the estate, or whether there was any estate. *Gaunt v. Wainman*, 32 E. C. L. R. 42.

The signing of the deed admits its execution, but it is con-

sistent with the deed to show that nothing passed by it, or that the grantor was not seized at the time. Comyn's Dig. Estoppel (E. 3) page 205, vol. 4 of 1st Am. ed. from 5 Eng. edition. We are estopped from denying the deed, but not from denying its operation. *Hayne v. Maltby*, 3 Term Reports, 439.

A recital, to amount to an estoppel, must come from the party to be estopped. *Miller v. Bagwell*, 3 McCord, 429. Grantee is not estopped from denying that grantor had no title. *Averill v. Wilson*, 4 Barb. Sup. Ct. Reports, 180. As to the supposed estoppel by the first answer, an estoppel must be certain to every intent. Co. Litt. 353 b, 303 a. Com. Dig. (E. 4) 205.

If, therefore, a thing be not directly and precisely alleged, it shall not be an estoppel, or if it be alleged by way of inference, a recital. Com. Dig. (E. 4) p. 205. 18 John. Rep. 490. *Averill v. Wilson* — (see opinion at page 188,) 4 Barb. Sup. Ct. Reports, N. Y.

Now what does the answer say? "That the assignment to them was only by way of mortgage." Surely we are not estopped by that.

Estoppels are odious, because they tend to conceal the truth. We admit the assignment, but deny its effect. We have a right to show that the assignment was of no effect, by reason of the prior absolute assignment, so that we had not the legal estate, nor the possession, and are not bound to pay the respondent his rent.

It is not like the case put in the books of pleadings, where the party, by pleading over, admits the truth of what has gone before.

*McKee & Clover*, for respondent.

I. The Court of Common Pleas committed no error in giving judgment for respondent upon the original answer of the appellants. That answer did not set forth facts sufficient to constitute a valid defence to the action. When a party takes an assignment of a lease, by way of mortgage, as a security



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for money lent, the whole interest passes to him, and he becomes liable for the payment of rent, though he never occupies, or becomes possessed in fact. *Williams v. Bosanquet, et al.*, 5 Eng. Com. L. Rep. 72. Platt on Covenants, 488. Coote on Mortgages, 118, 124. 4 Kent's Com. 144. *McMurphy v. Minot*, 4 N. H. 251. This is, unquestionably, a well established doctrine of the common law. It is founded upon the principle that the whole legal interest passes to the mortgagee, by virtue of the mortgage, and consequently gives to the mortgagee a right to the possession of the mortgaged premises.

The common law exists in this State without modification in this respect. It is adopted, generally, by express enactment, Rev. Stat. 1845, p. 593, and is incidentally affirmed in this particular by the act concerning mortgages, Rev. Stat. 1845, section 24, p. 753, wherein it is declared that the acknowledgment of satisfaction, upon any mortgage, shall have the effect to "revest in the mortgagor or his legal representatives, all title to the mortgaged premises;" clearly indicating that by the execution of the mortgage, the title passes out of the mortgagor to the mortgagee. *Carr v. Holbrook*, 1 Mo. Rep. 172. *White v. Todd & Todd*, 10 Mo. Rep. 189. *Meyer v. Campbell, McNiff & Barnes*, 12 Mo. Rep. 615, 616. The mortgagee may maintain ejectment against the mortgagor, *Wallop v. McKinney's Heirs*, 10 Mo. Rep. 229. By an assignment of the whole term, the mortgagee takes the whole interest of the lessee, and, by accepting it, assumes all the relations of the latter towards the lessor. In the case at bar, this was understood and intended by the parties; and the liability of the assignees, or mortgagees, to the lessor is expressed in the terms of the assignment, as a condition of the conveyance, as follows: "To have and to hold the said messuage to the said parties of the second part, (the appellants) and their legal representatives, for the residue of the term mentioned in said lease, under the yearly rents and covenants therein con-

tained, and on the part of the lessee to be done and performed."

II. The amended answer of the appellants was properly stricken out. The appellants cannot avail themselves of such a defence. They are estopped,

1. By the recitals and declarations contained in the deed of agreement and assignment. *Dickson v. Anderson*, 9 Mo. Rep. 156. *Stow v. Wyse*, 7 Conn. Rep. 214. *Jackson v. Parkhurst et al.* 9 Wend. 209. *Carver v. Jackson*, 4 Pet. U. S. Rep. 83. *Crane v. Lessee of Morris*, 6 Pet. U. S. Rep. 598. 1 Greenleaf on Ev. 26. 2 Starkie on Ev. 20, 437. Comyn's Dig. title "Estoppel." A party cannot set up title in another person contrary to a recital in his own deed. *Denn v. Brewer*, Coxe, 172. There can be no doubt that the respondent can take advantage of this estoppel by the deed; for although not a party, he is privy to that instrument. He is so, because the execution of it by the appellants created a relationship between him and them, both a privity of estate and a privity of contract. *Williams v. Bosanquet*, 5 Eng. Com. L. Rep. 78. Bouvier's definition of the meaning, in law, of the term "privity," is conclusive upon this point. He says, "privies are persons who are partakers, or have an interest in any action or thing or any relation to another." Bouvier's Law Dictionary, title "Privies."

2. The appellants are estopped by the record from setting up the defence contained in the amended answer. In their original answer, which is a part of the record, and which was verified by affidavit, they admit that they were the assignees of Angelbeck as to the leasehold in question. The same parties cannot, in the same suit, be permitted to deny a fact which they have alleged or admitted. Stephen on Pleading, 197. 4 Comyn's Dig. 190. The Mary, 1 Mason's Rep. 365. In addition to grounds of policy, which heretofore existed for sustaining and enforcing the law of estoppel—1 Greenleaf on Ev. p. 26—the late Practice Act has introduced another, as to the record. The pleadings must be sworn to. As the parties,

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therefore, would have to deny, under oath, what they once admitted under oath, to permit them to do so would be countenancing a practice immoral in the highest degree.

RYLAND, Judge, delivered the opinion of the court.

1. It will be seen from the foregoing statement of the case, that the main question for the decision of this court is in regard to the liability of a person to whom a lease has been assigned by way of mortgage, for the payment of rent to the lessor, without such assignee ever having possession of the premises leased. This question is embarrassed by authorities being found on both sides of it, both in the affirmative and in the negative. In the case of *Eaton v. Jaques*, Douglas, 455, Lord Mansfield and Justices Willes, Ashhurst, and Buller, held, that the assignee of the lease by way of mortgage, without having had possession, was not liable to the lessor for rent. Lord Mansfield said, numberless inconveniences would arise, if such a doctrine could be supported. The mortgagee never asks whether the rent be paid; he only looks to his security, and when the principal and interest be paid he re-assigns. But if the plaintiff is right, a mortgagee might be called upon years after such re-assignment, for arrears or breaches of covenant during the assignment. The consequences would be terrible.

Justice Buller declared, that even if the assignment were absolute, the action, in his opinion, would not lie without possession. He referred to Dane's Abridgment, title, "Rent," where the court declared that the ground upon which assignees are made liable, is because they have enjoyed the profits.

"In leases, the lessee, being the party to the original contract, continues always liable, notwithstanding any assignment. The assignee is only liable in respect to his possession of the thing. He bears the burthen while he enjoys the benefit, and no longer. To do justice between men, it is necessary to understand things as they are, and to construe instruments according to the intent of the parties. What is the effect of this

instrument between these parties? The lessor is a stranger to it. He shall not be injured, but he is not entitled to any benefit under it. It was a mere security, and it was not, nor ever is, meant, that possession should be taken until default of payment, and the money has been demanded." Such is the language of Lord Mansfield in the case of *Eaton v. Jaques*.

In the case of *Williams v. Bosanquet and others*, Broderip & Bingham, 238, 5 Com. Law Rep. 72, the case of *Eaton v. Jaques* is overruled by a large majority of judges, who decide that when a party takes an assignment of a lease, by way of mortgage as security for money lent, the whole interest passes to him and he becomes liable on the covenant for payment of rent, though he has never occupied or become possessed in fact.

It is a principle of law, that the assignee of a lease is subject to the performance of all the covenants contained in such lease, so that where a lease is assigned by way of mortgage, the mortgagee would become liable to the covenants in the lease, unless a distinction were made between an absolute assignment and one by way of mortgage. This distinction was recognized in the case of *Eaton v. Jaques*, and though it was overturned in the case of *Williams v. Bosanquet*, it, nevertheless, has more of equity and good sense to support it, than the contrary doctrine.

It is well settled, as a general rule, that a mere legal ownership does not make the assignee liable in such cases, without some evidence of his possession or actual agency. This principle is clearly recognized in the law of shipping—the rule being settled that the mortgagee of a ship does not incur the liabilities of an owner, until he takes possession, or actively interferes in the employment of the vessel. *Chinnery v. Blackburne*, 1 Hen. Black. 117. *Briggs v. Wilkinson*, 7 B. & C. 30. *Westerdell v. Dale*, 7 Term Rep. 306. *Brooks v. Bondsey*, 17 Pick. 441. *Colson v. Bonzey*, 6 Greenl. 474. *McIntyre v. Scott*, 8 Johns. 159.

It seems to us the better opinion that the mortgagee of a term of years, who has not taken possession, has not all the legal right, title and interest of the mortgagor, and therefore is not treated as a complete assignee, so as to be chargeable on the real covenants of the assignor. The case of *McMurphy v. Minot*, in 4 N. H. Rep. 251, is an authority against this view of the subject. In this case, Richardson, Chief Justice, says, the case of *Eaton v. Jaques* has been long questioned, and cites 7 Term Rep. 312, and also the case of *Williams v. Bosanquet*.

The doctrine of *Williams v. Bosanquet* stands on purely technical principles. It is conceded that, if the assignee by way of mortgage have all the term of the lease except one month, or one day only, assigned to him, he is not liable. The whole interest and estate of the lessee would not pass by the assignment, if one day of the term still remained in him.

The doctrine in *Eaton v. Jaques* is founded in substantial justice and equity, and supported by strong common sense. Under the doctrine of *Williams v. Bosanquet*, a mortgagee might lose his capital and interest and still be compelled to pay rent without deriving a farthing from the estate. In the case before us, the lease was assigned by way of mortgage; it was a mere security for the payment of money. The assignee never took possession; it never entered into the heads of the assignees, that the mortgage to them, in order to secure the money due to them, made them liable to pay the rent under the lease. We hold, therefore, that possession in the assignee is necessary in order to create a liability to payment; that the assignee must be in a situation to receive the benefits, before he can be made to suffer the burden. Possession is the mother of his liability, to borrow a maritime idea about freight and wages.

Greenleaf's Cruise on Real Property has afforded much light on this subject, title 15, Mortgages, chap. 2, page 110, note 1; and I have adopted and used the language of the courts and elementary works as far as suitable to the subject embraced

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herein. I do not think it necessary to review the authorities any further on this subject. We have examined and compared many cases, and the conclusion we have formed is contained in this opinion.

The other judges concurring, the judgment of the court below is reversed, and the cause remanded.

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HOYT, Plaintiff in Error, v. REED, Defendant in Error.

1. The plaintiff, in his declaration, averred that he had deposited a certain sum of money with B, as a banker, and that the defendant, C., in consideration that B. would take him as a partner, had promised to pay the sum so deposited. The evidence was, that the plaintiff had deposited the money with B. and D. as partners, and that D. went out, and shortly after C. came into the firm. *Held*, this was no material variance.
2. In such a case, when the plaintiff produced his bank book, which showed his account, commencing before the defendant came in as a partner, and running down after he came in, with balances struck after that time; and when it was shown that this account was but a transcript of the ledger of the concern, the court could not, with propriety, say there was no evidence, that the defendant had assented to the transfer of the liabilities of the old to the new firm.
3. Where the plaintiff obtains a verdict for too large an amount, it is proper to allow him to enter a *remittitur* for the excess, to avoid a new trial.

*Error to St. Louis Circuit Court.*

This was an action of *assumpsit*, instituted by Silas Reed, the defendant in error, in the St. Louis Circuit Court, at the November term, 1844, against Cyrus G. Hoyt and Apollo W. Sterling.

The declaration was for money lent and advanced, money had and received, and for money paid, laid out and expended.

At the November term, 1849, of said court, the plaintiff, by leave of court, amended his declaration, by adding a special count, to the effect, that the plaintiff, Reed, had deposited \$4,063, which he lent and advanced to the defendant, Sterling, in his business of broker and banker, at his instance and request; and that Hoyt, in consideration that Sterling would take him as a partner in said business, and would form a part-



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nership with him, undertook and promised to pay the plaintiff the said sum of money, &c. The plaintiff also averred in his amended count, that Sterling did take Hoyt into his business as a partner, and formed a partnership with him, by means whereof, &c. To the original and amended declaration, Hoyt plead *non assumpsit*, and defended the action.

The plaintiff, Reed, furnished and filed a bill of particulars, as the foundation of his action, headed as follows :

“ Bill of particulars of his demand against said defendant, Hoyt. Cash deposited with defendant, as co-partner with Apollo W. Sterling, as follows :

1843.	October 14th,	cash,	-	-	-	\$300 00
“	“	28th,	“	-	-	500 00
“	“	“	“	-	-	300 00
	January	— notes deposited as cash,	-	-	-	450 00
“	December 26th,	cash	-	-	-	1000 00
“	“	27th, notes deposited as cash,	-	-	-	600 00
		cash,	-	-	-	220 00
1844.	January 4th,	cash,	-	-	-	500 00
“	“	“	“	-	-	193 00

\$4,063 00

Cash lent and advanced by plaintiff to defendant, Hoyt, as co-partner with defendant, Sterling, as follows :

1843.	October 14th,	cash	-	-	-	\$300 00
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(Repeating the same items as above.)

At the trial, the plaintiff below introduced as a witness, the book-keeper of Sterling & Co., who testified that the firm of Sterling & Co., when he first knew it, was composed of Apollo W. Sterling, and ——— Eckley ; that Eckley withdrew, and Hoyt became a partner ; that the partnership was to have taken place on January 1st, 1844 ; but, the books not being ready, it did not until January 8th, 1844. The bank book of the plaintiff, Reed, with Sterling & Co., was shown the witness, and he testified that he recognized it, and that most of the entries in it were in his own handwriting ; that Sterling & Co. were

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doing a broker's and banker's business ; that they received deposits from others besides Reed. The witness did not know on what terms Hoyt became a partner in the firm of Sterling & Co. ; that it was about the 8th January, 1844, when he went in ; that he, the witness, was in the employ of Sterling & Co. after Hoyt became a partner, as long as the firm did business ; that all the entries in the bank book, and not included in brackets, are in his hand writing. He was not able to state who made the other entries.

The witness testified, that after Hoyt became a partner in the firm, he was not personally engaged in the transaction of the business. He was engaged and employed in Col. Chambers' office, collecting rent, &c. The name of the firm was not changed when Hoyt came in. Witness was not able to state whether the deposits were made on the days on which credits are made in the said bank book of plaintiff. The entry in said bank book of January 11th, 1844, it was the impression of the witness, was not a deposit of cash, but was that much assumed by A. W. Sterling and was charged to his private account. This bank book was in the possession of Reed. The said entry was made by direction of Sterling, but witness was not able to state whether the transaction was interest or old deposits. His impression was, that he charged said amount of \$193 in Sterling's private account, and credited Reed with it. The witness stated that the bank book referred to embraced deposits made with the concern, before Hoyt went into it.

Eckley went out about the 1st of January, 1844, or last of December. The book offered in evidence was in Reed's possession, and was his bank book with Sterling & Co. Witness did not know that Eckley was a partner, except from what Sterling told him. Eckley's son was employed about the office, and Sterling wanted to get rid of Eckley and his son. Before Hoyt came into the concern, witness saw Hoyt, Sterling and Col. Chambers in a room in the rear of the office on a Sunday, either before the 1st of January, or after the 1st and before the 8th of January, 1844, looking over the books of

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the concern of Sterling & Co., but the witness did not know what sort of examination was made, or what they were doing with them. He found them there after usual dinner hour, and he left before dark ; can't say whether Hoyt was there after he left, or went away before. Hoyt put \$1200 into the concern. The style of the firm was Sterling & Co., and it was not changed after Hoyt came in as a partner. The witness stated that this bank book is a transcript of the ledger of the concern.

The bank book shown witness and about which he gave testimony, was read in evidence. The first entry in the bank book referred to by this witness, is dated October 26th, 1843, on the debit side, and October 24th, 1843, on the credit side. From this time forward, different entries, at different dates, and on both sides of the account, were made, down to December 22d, 1843, when the book appears to have been balanced and a credit in favor of Reed appears of \$1575 23.

The next entry on the debit side is January 8th, 1844, and also on the credit side on the same date. Different entries, on different dates and on both sides of the account, were made, down to January 31, 1844, when a balance was struck, which was \$1162 86, in favor of Reed. The next entry on the debit side was February 2d, (year not stated) and different entries were made on different dates, on the debit side of the account, down to February 13th, 1844. On the credit side, the last balance of \$1162 86, was carried forward, and at the last named date, the debits footed at \$360 85, and the credits at \$1162 86, leaving a balance of \$802 01.

This was all the evidence in the case, and, thereupon, the defendant, by his counsel, asked the court to give the following instructions, viz :

1. There is no evidence upon which the jury can rightfully find for the plaintiff on the amended count.
2. There is no evidence that the defendant, Hoyt, assented to the transfer of any of the liabilities of A. W. Sterling and Eckley, or either of them, to the firm of which he, the defendant, became a member.

Which were refused by the court, and to the refusal thereof defendant at the time excepted. The court gave the following instructions, at the instance of defendant, viz :

1. If the jury find that the item of \$193, credited on the book of plaintiff, was merely a balance in favor of Reed, due from Sterling to Reed, and not a deposit, then the defendant, Hoyt, is not liable for it, unless he assented to it, as a charge against the firm of which he was a member.

2. If the jury find that the item of \$193, entered to the credit of Silas Reed, was the private debt of Sterling, the defendant, Hoyt, is not liable for it, unless he assented to the entry as a charge on the firm.

3. The plaintiff cannot recover against the defendant, Hoyt, under the first two counts, for any money deposited by the plaintiff with A. W. Sterling, or A. W. Sterling & Co., before said Hoyt became a partner.

4. The plaintiff is not entitled to recover against Hoyt, under the first two counts, for any balance due to the plaintiff from A. W. Sterling & Co., before the said defendant became a partner.

5. The plaintiff is not entitled to recover against Hoyt, under the amended count, unless it is proven to their satisfaction that there was a balance due from A. W. Sterling & Co., before said Hoyt became a partner, and that it was a part of the agreement between said Sterling and Hoyt, that the said Hoyt, in consideration of his being taken into the firm of A. W. Sterling & Co., should pay the same.

The verdict was for the plaintiff. Within the time prescribed by the rules of the court, defendant filed his motion for a new trial, assigning the usual reasons. The court, in disposing of said motion, stated to plaintiff, that if he would remit the item of \$193 and the interest thereon, amounting to \$268 27, the court would allow the verdict to stand. Plaintiff thereupon entered a *remittitur*, for \$268 27, and the court overruled said motion. To which overruling defendant at the time excepted,

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and thereupon sued out his writ of error, and brings his case to this court.

*Todd & Krum*, for plaintiff in error.

1. The court below erred in refusing to give the first and second instructions asked by the defendant, Hoyt.

2. The court below erred in refusing to grant a new trial.

3. The plaintiff below, by his amended declaration, predicated his right to recover on a special agreement, to-wit, that Hoyt, in consideration that Sterling would admit him into his business as a partner, promised to pay the plaintiff the money sued for, &c. There was no testimony proving, or tending to prove any such undertaking on the part of Hoyt. Nothing of the kind was pretended on the trial below. The case stands, therefore, upon the money counts of the plaintiff's declaration. The testimony is not sufficient to entitle the plaintiff to recover, under either of the counts in his declaration.

*A. H. Buckner*, for defendant in error.

1. There is no question before the court as to the admissibility of testimony, as no objection was made to any evidence offered.

2. The court did not err in refusing to give the first two instructions asked by defendant. There was evidence to go to the jury as to Hoyt's assent to the transfer of the liabilities of Sterling & Eckley, to that of Sterling & Hoyt, and there was no error in the refusal of the court to instruct the jury as asked by defendant, and thereby take the whole case from the jury.

3. All the other instructions given by the court were prayed for by defendant.

Those in relation to the item of \$193, if disregarded by the jury, do not entitle the defendant to a reversal of the judgment, inasmuch as the plaintiff entered a *remittitur* for that sum and interest.

4. The fifth instruction presented the law fairly to the jury, and the jury having found the facts to be that it was a part of the agreement between Sterling & Hoyt, that the latter

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should pay the balance due plaintiff, in consideration of Sterling's taking Hoyt in as partner, this court will not interfere with the finding of the jury.

GAMBLE, Judge, delivered the opinion of the court.

In this case, the plaintiff, Reed, asked no instructions, and all asked by the defendant, Hoyt, except two, were given by the Circuit Court. The two refused were, *first*, that there is no evidence upon which the jury can rightfully find for the plaintiff on the amended count; *second*, that there is no evidence that the defendant, Hoyt, assented to the transfer of any of the liabilities of A. W. Sterling & Eckley, or either of them, to the firm of which the defendant became a member.

1. The ground taken in support of the first instruction is, that the amended count averred that deposits had been made by plaintiff with A. W. Sterling, and that the defendant, in consideration of being admitted by Sterling as partner, agreed to pay the amount to plaintiff. The fact appeared to be that the deposits were made with Sterling & Eckley, as the firm of Sterling & Co. The evidence showed that Eckley went out of the concern about the last of December, or the first of January, and that the defendant came in about the 8th of January. This change in the members of the firm made no change in the business of the concern, and the bank book, held by the plaintiff during the time Eckley was a partner, was used as if no change had taken place. The account in it, both on the debit and credit side, was continued on, and balances were, from time to time, struck, as well before, as after the defendant became a partner. The account in this book was but a transcript of the ledger of the concern. Before the defendant came in, as partner, he was observed with Sterling and another person, in a back room, examining the books of the concern.

Although the deposits, made by plaintiff, were made when Eckley was a partner of Sterling, yet, when he went out of the concern, in December, or the first of January, the business of the concern remaining unchanged by his leaving it, the money of the plaintiff, thus deposited, continuing in the busi-



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ness, as conducted by Sterling alone, might well be averred to be money deposited with Sterling, when that deposit was to be the consideration of defendant's contract, and so there was no material variance.

2. The second instruction was also properly refused, for when the plaintiff produced his book, which showed his account, commencing before the defendant came in, as a partner, and running down after he came in, with balances struck after that time, and when it was shown that this account, so kept, was but a transcript of the ledger of the concern, the court could not, with propriety, say there was no evidence that the defendant had assented to the transfer of the liabilities of the old to the new firm. The evidence was the same in substance, as producing the books of the concern, of which the defendant is a partner, and using the entries in those books, to prove an indebtedness to plaintiff. The case was fairly left to the jury and the judgment will not be disturbed upon any review of the evidence.

3. The court below, ascertaining, by calculation, that the verdict must include an item for which the defendant was understood to be not liable to plaintiff, declared an intention to grant a new trial, unless the amount of that item was remitted by the plaintiff. It was remitted and the motion for a new trial was overruled. There was nothing wrong in this practice.

This court has allowed a *remittitur* to be entered here, to avoid a reversal of the judgment below, where it has appeared that the recovery has been for more than the plaintiff claimed by way of damages in his declaration. *Johnson v. Robertson*, 1 Mo. Rep. 615.

The judgment, with the concurrence of the other judges, is affirmed.

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Clark v. Maguire.

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CLARK, Plaintiff in Error, *vs.* MAGUIRE, Defendant in Error.

1. A. conveyed to B. one half of certain capital stock "in trust for the sole benefit of the wife of C. and her children;" also, one half of the profits arising from the stock, "to be applied by B., for the benefit of C.'s wife and her children." *Held*, this language is sufficient to exclude C.'s marital right to the profits.
2. A trustee has no power, by a deed substituting another trustee, to change the nature of the trust, or the use of the trust fund.
3. No particular form of words is necessary to vest property in a married woman to her separate use, so as to exclude the marital rights of her husband. Any words which indicate the intention will be sufficient.

*Error to St. Louis Circuit Court.*

This was an action of trespass, by the plaintiff in error, against the defendant in error, for taking personal property, and the questions which arise upon the record involve the construction of two deeds, under which the plaintiff claimed the property taken, the case turning upon the question of his title, under the deeds, to the property; the plaintiff submitted to a nonsuit, under the instruction of the court that "upon the whole of the evidence in this case, the plaintiff is not entitled to recover in this action."

The facts, as they appeared in evidence, are as follows: The sheriff of St. Louis county, under two executions, in favor of the defendant here, Maguire, against Dennis Marks, levied upon certain flour, wheat and barrels, claimed by the plaintiff, Clark, and identified as part of the property referred to in the deeds under which Clark claimed title, also given in evidence, and sold it and applied the proceeds to the payment of the executions in favor of Maguire. The levy and sale were made by the express directions, both verbally and in writing, of Maguire.

The plaintiff, to show his title to the property, showed Henry D. Bacon in possession of a mill, as lessee, and owning the personal property at the mill; the plaintiff then gave in evidence a deed from Henry D. Bacon to Joshua H. Alexander, dated July 17th, 1846, (recorded the same day,) by which

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deed, after reciting that his sister, Mrs. Amira M. Marks, wife of Dennis Marks, of St. Louis, by reason of the failure of her husband in business, then stood in need of the aid and support of her own blood relatives and near friends, and that it was his desire to make for her such comfortable and independent provision as might be in his power, he conveyed to Alexander half of the capital stock and property vested in, and used by him, in carrying on the mill, in trust, that he, Alexander, should hold it for the sole benefit of Mrs. Marks, (his sister, wife of Dennis Marks,) and her children, and to remain for a time vested in that business; and when the business ceased, one half to remain his (Bacon's) property, and the other to be delivered to the trustee, to be by him applied for the benefit of Mrs. Marks and her children, and providing that the trustee, whenever he should receive any money or property, by virtue of that deed, should pay and deliver it to Mrs. Marks, to be by her employed, as she might judge best, for the interest of herself and her children. And if, after the death of said Mrs. Marks, there remain in, or come to the hands of the trustee, any money or property on the account aforesaid, the same should be held and disposed of for the interest of her surviving children, in equal shares.

The plaintiff also gave in evidence a deed from said Alexander to himself, dated the second day of July, 1847, and recorded the same day, whereby, after referring to the foregoing deed, and reciting that the joint business under it had terminated, and that Bacon had settled with him and had ascertained the amount due to him, under that deed, and that Mrs. Marks had directed him to deliver and pay said property to the plaintiff, to be held by him, as trustee, for the benefit of herself and her children, he, by the express consent and direction of Mrs. Marks, evidenced by her signature to the deed, conveyed the same to the plaintiff, in trust, that the same should be used and employed in such manner, and in such business, and should be placed in the custody and under the control of such person or persons as the said Amira Marks might, at any time, in

writing, direct ; and that the same should be assigned, transferred, and disposed of in such manner, and to such persons, as she, the said Amira, might, in writing, direct.

The plaintiff also gave in evidence the lease to Henry D. Bacon, and an assignment of it, dated July 2d, 1847, to the plaintiff, as trustee for Mrs. Amira M. Marks and her children, for their sole use and benefit. And also gave in evidence, a power of attorney from Luther C. Clark to Dennis Marks, by the direction of Mrs. Marks, authorizing him to take possession of said property and to regard and carry out Mrs. Marks' directions in regard to said trust fund, and account to her for the proceeds he might receive therefrom.

It was also proved that Dennis Marks, up to the time of the levy, and since, had acted in managing and carrying on the mill, professedly as the agent of Luther C. Clark, trustee. And it was admitted that Mrs. Marks has four children, three of them minors. The plaintiff then closed his case, and the defendant made a point upon his title under the deeds, and the court so instructed the jury that the plaintiff submitted to a non-suit, and moved the court to set aside the same. The court overruled the motion, and the plaintiff brings the case here, for the reversal of the judgment.

*R. M. Field*, for plaintiff in error.

I. The deed from Bacon to Alexander created an estate for the sole benefit of Mrs. Marks and her children, effectual to exclude all claims on the part of the husband or his creditors.

No technical words are necessary to create a separate estate in the wife. It is sufficient, that on the whole instrument, the intent to exclude the marital rights is manifest. 2 Stor. Eq. section 1382. Hill on Trustees, 420. Roper on Husb. and Wife, 158, *et seq.* *Ex parte Ray*, 1 Madd. 115. *Wills v. Sayers*, 4 Madd. 409. The word "sole" is sufficient for the purpose. See authorities cited, *supra*.

II. The deed from Alexander to Clark is in like manner effectual to exclude the husband's creditors, for it recites the

former deed, and obviously was intended simply to change the trustee and continue the former trusts.

III. Even if the second did not formally declare the trusts of the first deed, so as to exclude the creditors of the husband, still the property was holden by Clark, under the trusts of the first deed, for it was not competent for Alexander to change the trusts of the original donor. The creditor was permitted by the court below to hold the property, on the ground that the second deed did not, in terms, exclude the marital rights.

The error of the court here is palpable; for, as it was dealing with merely equitable rights, it was bound by the rules of equity; and it was admitted, that in a court of equity, the property would be bound by the trusts impressed upon it by the donor in the original deed. In short, the creditor was justified in seizing the property as equitably belonging to the debtor, when, at the same time, the court admitted the debtor had no equitable right in it whatever.

It will be observed, that the decision of the court below goes entirely to defeat the rights of the children, as well as of the wife.

*B. B. Dayton*, for defendant in error.

The property, seized under the defendant's executions against Dennis Marks, was subject to such executions. The arrangement effected by the deeds, and power of attorney given in evidence, whereby it was sought to appropriate the labor and skill of Marks to the exclusive benefit of the pretended trust fund, in exclusion of his creditors, was fraudulent, as against the latter. They had a right to the results of his skill and labor, whatever those might be. *Patterson v. Campbell*, 9 Ala. Rep. 933.

If Mrs. Marks and her trustee chose to mix up the trust fund with the skill and labor of Marks, so that their relative influence in producing the joint fruits, and the share of each party in such fruits, could not be distinguished and ascertained, she must suffer and not creditors. The latter could seize the joint fruits and sell the same, or at least, the interest of

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Marks. If they were entitled only to some undivided portion, as the interest of Marks, still it was necessary and proper to seize all, in order to get at his interest. Story on Bailments, fourth edition, page 44, section 40. Ib. on Agency, page 193, section 205. Ib. on Equity, vol. 2, page 523, section 1282.

The evidence shows a case of insolvency on the part of Marks.

The principle invoked in the present case, is akin to that which governs a voluntary conveyance. Such a conveyance by a debtor would be void, as against an existing creditor, no matter what may have been the intention of the debtor. No man can give away what belongs to his creditors. *Reade v. Livingston*, 3 Johnson's Ch. R. 481. See, also, Amer. Lead. C., vol. 1, page 52, notes ; also, page 36, *et seq.*

The cases in Amer. Lead. C., vol. 1, page 319 to 327, are referred to, in support of the proposition that it was proper to seize all the property in question, to get at the interest of Marks.

It was suggested by a member of the court, that the trustee might be summoned as the garnishee of Marks. But under the terms of the deed, and the power of attorney, I respectfully suggest that the trustee could not be regarded as a debtor of Marks, or in any way responsible to him.

*Todd & Krum*, for same.

I. The deed of Bacon to Alexander plainly recognizes and embraces three distinct properties, and disposes of them differently and with different legal effect. 1. The half of the capital stock. 2. The half of the profits to arise therefrom. 3. The two notes and a pew. The language of the deed, as to the first and third, is, that they are conveyed to the trustee to be held by him "for the sole use and benefit of Mrs. Marks and her children;" as to the second, or the profits, the language of the deed is, that they are "to be delivered to the said trustee, to be by him applied for the benefit of Mrs. Marks and her children."



Admitting that the language of the deed is sufficient to exclude all right of the husband to the property under the first and third heads, yet, such is not the case as to that under the second. By express words, no title to the profits passes to the trustee, but he is to receive them in trust, not "for the sole and separate use" of Mrs. M., but to be paid and delivered to her, to be by her used," &c. Thus, when paid and delivered to her by Alexander, the title passes to her, and becoming vested in her, with power to do with it as she pleases, not under words or provisions necessarily or apparently excluding her husband, the property becomes his, as much as a legacy or any other gift paid and delivered to her.

Now, in the second deed, it is recited that this was paid and delivered to Alexander; and then, and not till then, he got the title to it, and then he paid and delivered it to Mrs. Marks, for such was his express duty, under the first deed, and such must, in legal effect, be construed to be the operation of the act of her, in the second deed, directing Alexander to pay and deliver it to Clark. It had then become the absolute property of Mrs. Marks, and therefore that of Dennis Marks, and consequently, her directing its transfer to Clark, by the second deed, could not take away the right of Marks already attached to it, but it still remained his property, at least *quoad* his creditors.

II. The deed of Alexander to Clark, the plaintiff below, dated July 2d, 1847, and under which he claims title to the property sued for in this suit, renders the property therein conveyed subject to the executions of creditors of Dennis Marks, or at least does not take from them what was so subject under the former deed. On the same day, Bacon also assigned the lease to Clark, in trust "for the sole use and benefit of Mrs. Marks and her children." Thus again the distinction is kept up, shown in the first deed. 10 Met. Rep. 281, 288. 2 Story's Eq. Juris. 609-10. Clancy on rights, p. 262. 2 Mylne & Keen, 184. 2 Rus. & Mylne, p. 183. *Wills v. Sayers*, 4 Mad. Ch. Rep. 408. 5 lb. 491. 3 Brown's Ch. Rep. p.

381, note 4, on p. 383—note *a*, p. 385. 3 Vesey, 166. 5 Ib. 517.

III. If the court should be of the opinion, that the language of the second deed is sufficiently operative to exclude the marital rights of Mr. Marks, then it did more than Mrs. Marks had power to do by directing it, so far as the large addition of upwards of \$8000 is concerned; for it is the portion embraced by the first deed, which was not vested for her sole use to the exclusion of Mr. Marks. It cannot be contended successfully, that Mrs. Marks, as to this property, could, by so directing, divest the right of her husband. She might direct what belonged exclusively to her to be for his use and benefit, but what he had a right to, she could not deprive him of, even with his consent, as against his creditors.

RYLAND, Judge, delivered the opinion of the court.

From the statement in this case, the main questions before this court depend, for solution, upon the construction to be given to the deeds from Henry D. Bacon to Alexander, and from Alexander to Clark, the plaintiff.

To arrive at a proper decision in this case, we must look to the circumstances, as they present themselves by the record. Dennis Marks having failed in business, his brother-in-law, Bacon, stepped forward to the relief of his sister and her children. His deed to Alexander commences by reciting, "That, whereas, my sister Mrs. Amira M. Marks, wife of Dennis Marks, of St. Louis, by reason of the failure of her husband in business, now stands in need of the aid and support of her own blood relatives and near friends, and it is my desire to make for her such comfortable and independent provision as may be in my power." Here we perceive the object of the grantor, and the motive which prompted the transaction—the failure of Marks in business—the consequent needy situation of Mrs. Marks and her minor children, and the duty which her brother felt resting on him, to make provision for his sister, by which she might become independent and comfortable.

For this purpose, he conveys to Alexander, in trust for

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Mrs. Marks and her children, one half the capital stock in the Eagle Mills establishment, then in his possession, as lessee. This stock and property, consisting of cash on hand, accounts due the mill, wheat, flour, implements, &c., not counting the lease itself, was valued at eight thousand eight hundred and seventy-two dollars. Of this, one half was conveyed to Alexander and to his executors and administrators, "subject to the trusts, conditions and limitations hereinafter expressed; that is to say, the said Alexander shall hold the title to the capital stock and property, in trust for the sole benefit of the said Mrs. Marks and her children; and the same shall remain, as it now is, vested and to be used for the carrying on of my said milling business, for one whole year from this date; and, if I shall think it most for the interest of the parties concerned, to remain so during the continuance of my lease upon said mill, which now has about three years to run." It was made the duty of the trustee, at the end of one year from the date, and at the end of every year thereafter, during the continuance of the milling business, to demand an account of said milling business, showing profits and losses; and at every such demand, there should be paid to the trustee, half of all the property made. At the end of the term, the capital stock and property then on hand, whether consisting of the same identical things used at the date of the deed, or others substituted therefor in the course of business, and whether of greater or less value, should be divided equally; one half to be delivered to the trustee, to be by him applied for the benefit of said Mrs. Marks and her children.

It was the duty of the trustee, upon the receipt of money or property, by virtue of the said deed, to pay and deliver the same to Mrs. Marks, to be by her employed as she might judge best for the interest of herself and her children. If any property or money remained after the death of Mrs. Marks, it was to be divided among the remaining children, in equal shares. The deed also contained a clause conveying to the trustee two promissory notes, due by Mr. D. Marks to other

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persons, which had been assigned by the payees to Bacon, and also a clause transferring a pew in a church to the trustee. These notes and the pew were conveyed to the trustee, to be by him disposed of according to his best discretion, for the sole use and benefit of said Mrs. Marks and her children.

After this deed had been made and recorded, Alexander took upon himself the trust, and by his deed, dated July 2d, 1847, signed by him and by Amira M. Marks, and Luther C. Clark, the plaintiff, the said Alexander conveyed the property mentioned in the deed from Bacon to him, that is, the trust property and the profits arising thereon, to the said Clark, for the benefit of Mrs. Amira M. Marks and her children.

This last deed recites, that the trust property and money, now in the hands of said Alexander, amount to thirteen thousand eight hundred and seventy-three dollars; and that the milling business had terminated; and that the trust property and money were required by said deed from Bacon to Alexander, to be paid to the said Mrs. Marks, to be employed under her direction for the benefit of herself and children. And, "whereas, the said Amira M. Marks has directed that the said trust property and money should be delivered and paid over to Luther C. Clark, of St. Louis, to be held by him as trustee, for the benefit of herself and her children, and to be used and employed as she may direct," &c., the said Alexander did, thereby, with the consent of said Amira M. Marks, sell and convey the same, in trust, to said Clark, &c.

Clark made Dennis Marks his attorney in fact, or rather his agent, to attend to the management of the trust fund. This was done by the direction of Mrs. Marks.

The defendant, Maguire, having, before the deed from Bacon to Alexander, obtained judgments against Marks for a considerable amount, directed the sheriff to levy on the property, which Dennis Marks, as agent for Clark, was attending to and managing, that is, the trust property, and had the same sold to satisfy his debt. The property was seized and sold by order of Maguire, as the property of Dennis Marks.

This suit is brought to recover damages for the trespass committed. The plaintiff was nonsuited below, upon an instruction given by the court to the jury, that from the evidence of the case, he, the plaintiff, was not entitled to recover.

1. The only possible view, by which this instruction can be defended, depends on the meaning and construction of the deeds from Bacon to Alexander, and from Alexander to Clark. It seems that there can be no pretence by which the husband, Dennis Marks, can be declared to have any marital rights in the property first conveyed by Bacon to Alexander, that is, the stock in the mill at the time of the deed, amounting to eight thousand eight hundred and seventy-two dollars, half of which was conveyed to Alexander, as trustee, for the sole use of Mrs. Marks and her children. Nor is there any pretence that he has any right or property in the proceeds of the two promissory notes and the church pew. These were also conveyed for the sole benefit of Mrs. Marks and her children. But to the profits arising from the property conveyed, although the property itself be expressly conveyed for the sole use of Mrs. Marks and her children, it is contended, and strenuously contended, that the marital rights of the husband attach, and that these profits can be sold, under execution, in favor of the husband's creditor.

This construction is given to the deed, because the profits are mentioned therein, and directed thereby, to be applied for the benefit of Mrs. Marks and her children — omitting the words "sole use." Now, it is generally admitted, that the incident will follow the principle. If there had been no mention made of the profits arising from the one half of the "mill stock," in this case, conveyed to the trustees for the sole use of Mrs. Marks and her children, could there have been a doubt to whom these profits would go? Would any one have thought the husband of Mrs. Marks had any right or title to such profits?

We must look to the intention of the parties. Here it is obvious, that Bacon supposed that he could do more for his sister,

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by conveying one half of a profitable mill establishment to a trustee, for her and her children, than by giving so much money, to be put at interest, or otherwise employed as producing capital ; therefore he conveys one half of this mill for the sole benefit of herself and her children, to a trustee, expressly stating, that if the business turns out properly, he would continue it for three years. Was it not the design of the grantor that these profits and increase should be for the sole benefit of his sister and her children? Was it not manifest, that his intention was to make her comfortable and independent? Her husband had failed ; it was not to enable him to pay his debts that this conveyance was made. Nor were the profits arising from the trust fund to be so liable. From the whole deed from Bacon to Alexander, I am at a loss how it could ever have been thought that these profits were for Marks' creditors, although the fund producing them was solely for the benefit of the wife and children. There is no clause conveying the profits arising from this fund, in any way or manner different from that in which the fund itself is conveyed. The deed requires the trustee to demand a settlement at the end of the year ; to receive the profits, and to pay them to Mrs. Marks, that she may employ them as she may think best for herself and her children. Now, because the words " sole use and benefit," or " sole benefit," or " sole use," of herself and children are omitted, therefore the money, when received from this fund which was for the sole benefit of herself and children, shall not be for the benefit of herself and children, but shall be taken away and applied to pay debts of her husband.

We must look at things as they are, and construe words and instruments, according to the meaning and intent of the parties, as manifested thereby.

There is nothing, then, in the deed from Bacon to Alexander, warranting the construction contended for by the defendant below.

2. The deed from Alexander to Clark must be construed with an eye to the deed from Bacon to him. Alexander has no



power to change or alter the use of the trust fund. His deed to Clark was nothing more than changing the trustee and putting Clark, at the request of Mrs. Marks, in the management of the trust fund. No change of this fund was designed by him. He refers to the original deed to him from Bacon, and transfers the legal title in the fund to Clark, as the future manager thereof, for Mrs. Marks and her children.

It has been said by the plaintiff's counsel, that, even if the second deed did not formally declare the trusts of the first deed, so as to exclude the creditors of the husband, still the property was held by Clark, the plaintiff, under the trust of the first deed; for it was not competent for Alexander to change the trusts of the original donor. The creditor was permitted by the court below to hold the property, on the ground that the second deed did not, in terms, exclude the marital rights. This was error in the court below; for, as that court was dealing with merely equitable rights, it was bound by the rules of equity; and in a court of equity, this property would be bound by the trusts impressed upon it by the donor in the original deed. I accord with this view.

3. The case cited by the defendant's counsel, from 4 Madd. Ch. R. 409, *Wills v. Sayers*, is different from this. There the Vice Chancellor used one phrase in the will, in which a donation was couched, in order to arrive at the intention of the testator in another donation couched in different terms. The testator gave, by will, £750, three per cent. stock, upon trust, to apply £600 stock and the dividends, for the sole and separate use and benefit of his daughter, the plaintiff, Mary Wills, and her receipts were to be sufficient discharges for the same; and £150 stock, the residue of the said £750, for the use of his grand children, M. Wills, O. K. Wills, and J. M. Wills, at such times and in such manner as the plaintiff, Mary Wills, should direct. And he bequeathed all his household and other goods, plate, &c., not otherwise disposed of, after payment of debts, &c., unto the plaintiff, for her own use and benefit.

The question was, whether the words "for her own use and

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benefit," used in the residuary bequest, gave the plaintiff a separate estate. The Vice Chancellor said: "In equity, as at law, a gift to the wife is a gift to the husband, who being bound to maintain the wife, is entitled to her property. A court of equity, however, will execute the trust for the sole and separate use of the wife, when the intention of the donor to that effect is unequivocally declared. A gift to the wife, for her use, is no declaration of such an intention, and it is difficult to find any substantial distinction between a gift to a wife, for her use, and a gift to a wife for her own use. But, if such a distinction could prevail in another case, it could not govern this. Here the testator, as to the same person with respect to another gift, has appointed a trustee, and expressly directed the application of it to her sole and separate use; he knew, therefore, the technical form of excluding the right of the husband, and I cannot infer that, as to this legacy, he intended what he has not expressed."

Now, from this, the intention of the donor was the great point to be found, and that was to be carried out.

In the case before the court, this very intention is sought to be defeated, although it is unequivocal and manifest, by a hair-spun, technical construction of the instrument. In construing such a deed as this, the sympathies of our nature must become very cold, before we can be induced to destroy such manifest intention by a mere technicality.

In a gift or bequest to a married woman, after marriage, the words, that she is to have the property "to her sole use or disposal," or "to her separate use or disposal," or "for her own use and at her own disposal," or "to her own use during her life, independent of her husband," or "that she shall enjoy and receive the issues and profits," or that it is an allowance as or for "pin money," *eo nomine*, will exclude the marital rights of the husband, and the property will be for her exclusive use. Stor. Eq. section 1382.

In *Stanton v. Hall*, 2 Rus. & Mylne, 175, (6 vol. Condensed Eng. Ch. Rep. 448,) the Lord Chancellor said, "it was

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clear that no particular form of words was necessary, in order to vest property in a married woman, to her separate use. That intention, although not expressed in terms, might still be inferred from the nature of the proviso annexed to the gift; as where, for example, the direction was, that the property should be at the wife's own disposal, or that her receipts should be a good discharge; circumstances which raised a manifest implication that the marital right was meant to be excluded." I deem it unnecessary to review the various cases referred to by the counsel, as I am compelled, without the least hesitation, to state, that I cannot see how it could be doubted, in this case, that the rights of the husband never did attach. This whole transaction plainly points us to this conclusion. The husband had failed; the generosity of the brother stepped in to relieve his sister, the wife of that husband. The brother says that he has no doubt he can best provide for the comfort and independence of his sister, by setting apart a portion of his mill establishment, and the profits thereof, for her and her children; and in order to carry into effect this determination on the part of the brother, he conveys to a trustee the half of the mill establishment and stock on hand, worth upwards of four thousand dollars, for the sole benefit of this sister and her infant children; with directions to the trustee, to receive the yearly profits and pay the money to Mrs. Marks, (his sister,) for her own and her childrens' use and benefit.

The whole object was, to provide for the sister and her infants, and to do this, without even permitting her husband to have any rights or interest in the trust fund.

The evidence shows that the plaintiff had the legal title and right in and to the property seized and sold by the sheriff, at the order and under the directions of the defendant, Maguire. There was nothing to prevent his recovery. The instruction, therefore, given to the jury, that the plaintiff was not entitled to recover, is erroneous. The judgment below must be reversed, and this cause remanded for further trial, Judge Scott concurring herein. Judge Gamble, having been of counsel in the court below, did not sit in the cause.

## RUCKER, Respondent, vs. MUSICK, Appellant.

1. Under the new code, when a case has been tried by the court below, without a jury, and there is no finding of facts preserved in the record, the judgment will be affirmed.*

*Appeal from Franklin Circuit Court.*

Jones, for appellant.

Frissell, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding under the new code, for partition and for relief, in the nature of an ejectment. The cause was submitted to the court, without the intervention of a jury, and none of the facts, on which the judgment of the court is founded, are preserved in the record. There is, it is true, a bill of exceptions preserving the evidence in the cause. But this is not what is required by the fifteenth article of the code, when the trial is by the court. The second section of that article enacts, that in giving the decision, the facts shall be first stated, and then the conclusion of the law upon them. So it is not sufficient to set out the evidence in a bill of exceptions, but the material facts established by the evidence and which constitute the foundation of the judgment, must be stated in the record preceding its entry. If an exception to the finding of any fact by the court is taken, then, only, a bill of exceptions is necessary, showing so much of the evidence bearing on the fact, that this court may determine whether the fact has been properly found by the court below. This construction of the code has been maintained in several cases, and for want of the finding of the facts by the court below, the other Judges concurring, the judgment must be affirmed.

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*This rule has since been changed, in the case of *Bower v. Bates*, determined at the March term, 1853. It was there decided, that a judgment will be reversed, instead of affirmed, when the trial was by the court, and there is no finding of the facts preserved in the record.—[REF.]

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Boyce's Administrator v. Smith's Administrator.

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## BOYCE'S ADMINISTRATOR, Respondent, vs. SMITH'S ADMINISTRATOR, Appellant.

1. The statute directing that a second new trial shall not be granted to the same party, except when the triers of the fact shall have erred in a matter of law, or when the jury shall be guilty of misbehavior, proceeds upon the supposition that the law has been correctly expounded to the jury, and is only applicable to such cases.
2. When a second new trial has been improperly granted, that matter can only be corrected by a mandamus from the Supreme Court.
3. When a new trial has been refused, the Supreme Court, on appeal or writ of error, will look into the record, and if it finds that incorrect law was given to the jury, will reverse the judgment and award a new trial, without regard to the number of new trials previously granted to the party.
4. Equitable interests, in personal estate, are not vendible under execution.

*Appeal from St. Louis Circuit Court.*

C. C. Whittelsey, for appellant.

1. After the expiration of the term for which the premises were let, the fixtures could not be removed, but became a gift to the landlord. *Poole's case*, 1 Salk. 368. *Holmes v. Tremper*, 20 J. R. 29. *Lyde v. Russell*, 1 B. & Ad. 394. 2 Smith's L. C. 110. *Fitzherbert v. Shaw*, 1 H. Black, 258. 2 Smith's Lead. Cases, Am. ed. p. 194, and notes, p. 208.

2. The articles sued for were fixtures, and not mere personal chattels, and could not be removed after the term. *Elwes v. Maw*, 3 East. R. 38. 2 Smith's L. C. 194, Am. edition.

3. Dickinson & Holmes being indebted to the defendant's intestate, and they having surrendered or left these fixtures upon the premises, and the intestate, Smith, being found in possession of the premises, the fair presumption of law is, that they were abandoned in payment of the rent.

4. Dickinson & Holmes had, before the levy or issuing of the executions, sold and conveyed the property to Drake, as trustee for creditors, and Drake had immediately taken possession. The time limited for the payment of the debts had

elapsed, and the title had become absolute in Drake, and Dickinson & Holmes had no title or right which could be levied upon and sold by execution, having a mere right to call for an account or to redeem, by showing that they had paid the debts secured. The title of Drake was absolute. *Robinson v. Campbell*, 8 Mo. R. 365. Same v. same, 8 Mo. R. 615. *Williams v. Rorer*, 7 Mo. Rep. 556. *Brown v. Bement*, 8 John. R. 96. *Ferguson v. Lee*, 9 Wend. R. 258. *Ackley v. Finch*, 7 Cow. R. 290.

5. The sale by the sheriff conveyed no interest to the plaintiff, to enable him to maintain this action, as, at best, his right would be the right to redeem, the property being in the possession of the trustee, together with the legal title, which had become absolute by failure on the part of D. & H. to pay within the time limited by the deed, and that right was not subject to levy and sale; it was a *chose* in action. The interest of the mortgagor in chattels is not subject to levy and sale under execution. *King v. Bailey*, 8 Mo. Rep. 332. 2 Bacon's Ab. Tit. Execution, 715. So that the mortgagor could not have maintained trespass for the taking of the goods by a stranger, but the suit must have been in the name of the assignee. *Langdon v. Buel*, 9 Wend. R. 80. It could only be levied on as the property of the mortgagee. *Ferguson v. Lee*, 9 Wend. R. 258. After forfeiture, the interest of the mortgagor cannot be levied upon and sold. *Huntington v. Smith*, 4 Conn. R. 235. The interest of the *cestui que trust* is subject to execution and not that of the vendor. *Eastland v. Jordan*, 3 Bibb, 186.

6. The levy and sale by the sheriff was void, as the property, by the evidence, at the date of the *fi. fa.* the levy and sale, was in the possession of Drake, the trustee.

7. The instructions given by the court disregarded the evidence given on the trial, that Dickinson & Holmes had transferred the possession as well as the title.

*T. Polk*, for respondent.

The plaintiff below has had four verdicts. On the fourth



motion for a new trial, neither one of the only two reasons for which alone, by the statute, a second new trial can be awarded by the *nisi prius* court, is assigned as a ground of the motion. If neither of those reasons existed, the lower court could award no new trial, and of course could commit no error in refusing it. *Humbert v. Eckert*, 7 Mo. R. 259. *Floersch v. Bank of Missouri*, 10 Mo. R. 517. Rev. Code of 1845, p. 830, section 3.

A new trial could not a second time be granted, for misdirection by the court. The error of law, alluded to by our act, must be a misconception of the instructions of the court, or an entire disregard of them. *Hill v. Deaver*, 7 Mo. R. 60. *Dickey and others, v. Malechi*, 6 Mo. R. 185. *Hill v. Wilkins*, 4 Mo. R. 86.

Possession of personal chattels is sufficient to maintain the action of trover for their conversion, against a mere wrongdoer, having no title. 2 Sel. N. P. 521-2. *Wilbraham v. Snow*, 2 Saund. 47 and note. *Barker v. Miller*, 6 Johns. 195. *Armory v. Delamirie*, 1 Strange, 505. *Sutton v. Buck*, 2 Taunt. 302. *Burton v. Hughes*, 2 Bing. 193. *Robert v. Wyatt*, 2 Taunt. 268. Special property is also sufficient to enable a person to maintain it. 2 Sel. N. P. 521-2, and authorities there cited. *Webb. v. Fox*, 7 T. R. 398.

The deed of trust, as soon as the debts secured by it were paid, ceased to be a bar to plaintiff's recovery. Even in an action of ejectment, an outstanding term, which has been satisfied, has been held not to be a sufficient bar to the plaintiff's recovery. *Adams' Eject.* 85, and note. 2 B. & A. 710. Sugden on Vendors, top page, 542 *et seq.*, and authorities there cited.

But this deed contains an express provision that if the debts secured by it should be paid by the day therein mentioned, the deed should be void and the property released.

The jury was correctly instructed as to the law of fixtures. The instruction on that subject contained the law as laid down by this court in this very case, when it was first here. 9 Mo.

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Boyce's Administrator v. Smith's Administrator.

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R. 564. *Elwes v. Maw*, 3 East. 38. *Lawton v. Lawton*, 3 Atk. 13. *Dudley v. Warde*, Ambler, 113. *Penton v. Robart*, 2 East. 88. *Curtiss v. Hoyt*, 19 Conn. 154. *Wetherby v. Foster*, 5 Verm. R. 136. Gibbons on Fixtures, 22, 23, 24, *et seq.*

SCOTT, Judge, delivered the opinion of the court.

This was an action of trover, commenced by the plaintiff's intestate against the defendant's intestate, for the conversion of a quantity of plank and lumber, alleged to be fixtures. The plaintiff obtained judgment. There had been several previous trials, and a new trial had been awarded to the defendant, for reasons which do not appear in the record of this cause. It appears that the intestate, Smith, leased to H. B. Dickinson the lot on which were situated the alleged fixtures, for the purpose of making bricks, from March, 1840, until March, 1841. On the 16th of March, 1841, the intestate, Boyce, obtained several judgments against the said H. B. Dickinson and Henry Holmes. On these judgments executions issued, returnable to the third Monday in July, 1841. The judgments were for the same debt, Dickinson and Holmes being partners. Under the executions, the property in controversy was sold, and W. H. Boyce became the purchaser. Dickinson & Holmes, by a deed of trust, bearing date the 30th of September, 1840, conveyed to Silas Drake the property in controversy, together with other property, to pay certain debts therein enumerated. It was provided in the deed that, if the debts secured to be paid were satisfied before the 15th of December following, it should be void, otherwise the trustee should sell the property to fulfil the purposes of the trust. The deed of trust was duly recorded. It appears that a sale under the trust, took place. A witness on the trial, which took place in December, 1840, testified that all the debts secured by the trust, had been satisfied. This witness was Holmes, the partner of Dickinson, who stated the foregoing fact as his belief. It seems that the intestate, Smith, claimed the fixtures as landlord, and removed them, they not having been taken away be-

fore the expiration of the lease. The court refused the following instruction, asked by the defendant: "If the jury believe from the evidence that Dickinson & Holmes, or Holmes, had, before the the levy of execution offered in evidence, conveyed the property in the declaration mentioned to Silas Drake, by the deed offered in evidence, then the plaintiff is not entitled to recover." The instruction which follows, was given at the instance of the plaintiff: "If the jury find, from the evidence, that the debts, for the securing of which, the deed of trust given in evidence by defendant was made, have been all paid or settled for, then that deed is no bar to the plaintiff's recovery." To the refusing and giving these instructions exceptions were taken. The aspect of this case is so changed since it was first in this court, that we deem it now unnecessary to enter into an examination of the instructions relative to the law of fixtures. It may be determined without reference to the law on that subject. A motion for a new trial, with the usual reasons, was made and overruled, and the defendant appealed to this court.

1. The counsel for the appellee maintained, that there was no error in the court below, in refusing a new trial. That there had been one new trial granted to the defendant, and as the statute directs that a second new trial shall not be granted to the same party, except when the triers of the fact shall have erred in a matter of law, or when the jury shall be guilty of misbehavior, and as neither of these causes is alleged as a reason for granting a new trial, the motion was properly overruled. The object of the law, in restraining courts from granting the same party two new trials, is, to prevent the substitution of the verdict of the court for that of the jury. When two juries, on the same issue, find the same verdict, the law will not permit the court to interfere with the last finding, as the jurors are the constitutional triers of the facts. So, if a court misdirects a jury as to the law, and a second verdict is found consonant to the law and facts of a case, though against the instructions of the court, this court will restrain any inter-

ference with such a verdict. *Pratte v. Cabanne*, 12 Mo. R. In specifying the causes for which a second new trial could only be granted to a party, the statute proceeds upon the supposition, that the law has been correctly expounded to the jury, and the statute only applies to those cases in which this has been done.

2. If a second new trial has been improperly granted, that matter can only be corrected by a mandamus from this court.

3. When a new trial is asked for and refused, this court, on appeal or writ of error, will look into the record and examine whether the verdict may have been caused by the misdirection of the court in which the trial was had, and if such has been the case, will reverse the judgment and award a new trial, without regard to the number of new trials which may have been previously granted to the party.

4. Neither the instruction given, nor that refused, was sufficiently pointed. The question was not whether the debts secured by the deed of trust were satisfied at the time of trial, but whether they existed at the time of the sale by the sheriff. If they did, the legal title in the property was in the trustee, and there was nothing which could be reached by an execution at law, and consequently nothing passed by the sheriff's sale to Boyce. In the case of *Hendricks v. Robinson*, 2 J. C. R. 283, it was held that the mere equitable interest of a debtor in the personal property assigned by him as security, cannot be reached by process at law, or be bound by execution. The same doctrine is recognized in *Bailey v. Burton*, 8 Wen. 345. The statute subjects equitable interests in real estate to execution, but there is no provision which makes equitable rights in personal estate vendible under execution. The case of *King v. Bailey*, 8 Mo. Rep., is opposed to the proceedings under this execution, in evidence in this case. Since the argument of the point involved in this controversy, the case of *Yeldell & Barnes v. Stemmons*, has been determined, in which this question arose. Stemmons executed a mortgage deed upon some slaves and other property, to secure the payment of cer-

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tain debts, and continued in possession of the mortgaged property. A creditor, other than the mortgagor, sued out execution against Stemmons and sold his interest under the mortgage. Yeldell & Barnes became the purchasers at the sheriff's sale, and afterwards sued Stemmons to recover his possession of the property, and it was held, that no interest passed to the purchasers by the sheriff's sale. It is against policy that uncertain interests of the debtor in property should be exposed to sale. Experience shows that such sales generally result in great sacrifices, both to the debtor and creditor. The debtor is stripped of his property and no satisfaction is made of his debts. In such cases a creditor is not without redress, as, by a suitable proceeding, he can have the interest of his debtor subjected to sale, in a manner that will avoid any sacrifice.

The other Judges concurring, the judgment will be reversed and the cause remanded.

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BARADA, Appellant, v. INHABITANTS OF CARONDELET,  
Respondents.

1. A. brought an action against B., to recover the proceeds of land sold as A.'s, on execution in favor of B., under a judgment, which, as A. claimed, B. had previously agreed to enter satisfied. *Held*, A. cannot maintain such an action, when he disclaims any title to the land sold, and admits on the trial that he has none.
2. Under the new code, a proceeding by *mandamus* cannot be joined with other actions.
3. Where a petition prays, among other things, for an injunction, but that branch of the petition is not passed upon by the court below, nor brought in any way to its notice, the Supreme Court will not interfere, as this would be an exercise of original jurisdiction.

*Appeal from St. Louis Circuit Court.*

On the 30th of September, 1842, the defendant recovered judgment against the plaintiff and his securities, Benoist Mareschal and George Shoults, for the sum of twelve hundred and five dollars and ninety-eight cents, together with the costs of the suit. On the 13th of September, 1845, the

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board of trustees of said town enacted an ordinance in words and figures, as follows, to wit :

"No 81. An ordinance for the relief of Benoist Mareschal, and the legal representatives of George Shoults' estate.

"Be it ordained by the board of trustees of the town of Carondelet, as follows :

"Section 1. That the chairman of the board be, and he is hereby authorized and directed to ascertain the full amount of principal and interest remaining unpaid of the judgment which the Inhabitants of the town of Carondelet obtained in the St. Louis Court of Common Pleas, against Peter D. Barada and his securities, which judgment was appealed to the Supreme Court, and there affirmed ; and having ascertained such amount, he shall, in the name of this corporation, enter upon the execution in said case, or upon the records of said court, as he may deem most effectual, a *remittitur* or satisfaction, to the amount of sixty per cent. upon the total amount of principal and interest of said judgment remaining unpaid. But no such *remittitur* or satisfaction shall be entered until the costs accrued upon such judgment in the Court of Common Pleas, shall have been paid.

"Section 2. Whenever such *remittitur* or satisfaction shall be so entered, the defendants in said judgment shall be allowed for the payment of the balance, the term of four years, said balance to bear six per cent. interest ; but said defendants, or either of them, may at any time before the lapse of said four years, pay and satisfy said balance, or any part thereof.

"Section 3. It shall be the duty of the chairman of the board to keep alive said judgment, as a lien upon the property of said defendants, and to revive said judgment under the laws of the state, from time to time, so as to preserve such lien upon the real estate of said defendants."

The above ordinance took effect from and after the time of its passage. On the 19th of April, 1845, an execution was issued on said judgment, and on the 24th of May, 1845, and on the 7th of July in the same year, the sheriff of St. Louis



county, acting under and by virtue of said execution, sold enough of real and personal property of the plaintiff in this cause, to pay said costs, and one hundred and twenty-two dollars and ninety-three cents of said judgment. The proceeds of said sale were in the hands of said sheriff, at the time said ordinance was passed, and were in a few days thereafter, (September 15th, 1845,) applied by said sheriff to the payment of said costs, and the remainder was applied on said judgment. But the chairman of said board has ever since failed, neglected, and refused to enter said *remittitur* or satisfaction. On the 25th of November, 1845, the said Benoist Mareschal, in compliance with said ordinance, paid said corporation the sum of two hundred and ninety-seven dollars and ninety-nine cents, and obtained from said corporation a full discharge of all his indebtedness to said town, on account of said judgment. Before the passage of said ordinance, the said George Shoults died, without paying anything on said judgment. On the 1st of October, 1849, another execution was issued on said judgment, and on the 25th of February, 1850, the sheriff of said county sold real estate to the amount of six hundred and six dollars and sixty-four cents over and above costs, which said last sum was paid over by the sheriff to the corporation, in a few days after said last sale. On the 28th of February, 1850, another execution was issued upon said judgment, and the sheriff, by virtue of a sale of real estate under said last execution, made the additional sum of one hundred and ten dollars, in addition to costs, which said last sum was also paid over by said sheriff to said corporation.

The plaintiff in this case brought suit under the new practice act, and asked judgment; first, to compel the chairman to enter said *remittitur* or satisfaction on the record of said judgment, according to the provisions of said ordinance; second, for an account between the parties to this suit, in order to ascertain how the matter stands between them; third, to compel said corporation to pay over to him, (the plaintiff,) the amount made on said executions, over and above what is neces-

sary to satisfy said judgment; fourth, for whatever sums of money may be found justly due, after allowing all just credits; fifth, for damages sustained by the plaintiff on account of levying and selling under said executions, after said judgment, interest and costs were satisfied as aforesaid; sixth, to perpetually enjoin any further proceedings on said judgment by execution or otherwise; and seventh, for such other and further relief as the court might think consistent with equity and good conscience.

The defendants in their answer state, in substance, that it is true that they recovered judgment as hereinbefore stated; that the board of trustees of said town did pass said ordinance, but that the same was passed on the application of Benoist Mareschal, and the legal representatives of George Shoults only, and for their benefit, and not with the intent of releasing the plaintiff from any part of said judgment; that, as far as said ordinance contains direction to the officers of said corporation, no person has acquired any rights under said ordinance until those directions are complied with; that Benoist Mareschal paid to said town the sum stated in said petition on said judgment, for which the collector of said town gave a receipt; that the plaintiff in this case, at the several times of the sheriff's sales on the last two executions, said and declared that he had no right, title or interest in the property offered for sale by the sheriff. When the case came on for trial, the plaintiff read in evidence the said judgment, and said executions, and the returns of the sheriff thereon, and offered to prove by two witnesses that said ordinance was made for the benefit of the plaintiff, as well as for the benefit of Benoist Mareschal and George Shoults' representatives; but the court refused to admit the testimony of said witnesses. The plaintiff admitted on trial, that he had no right, title nor interest in the property sold under the last two executions, but was the owner of the property sold under the first execution. The defendants offered no evidence on the trial.

The defendants asked the court to give the following instructions, to wit :

“ 1. That the ordinance set out in the petition was no discharge of the judgment, even if its tenor had been strictly complied with by the defendants in the judgment.

“ 2. Said ordinance was no discharge of said judgment as to Barada, the principal defendant in said judgment, and present plaintiff.

“ 3. If, in fact, the present plaintiff had no title, estate, interest, claim or demand in the property sold on the two last executions, and did, at the time of such sales, disclaim such title, &c., then said plaintiff cannot recover any money made by the sales of such property.

“ 4. Under the facts stated and shown in evidence in this case by the plaintiff, the plaintiff is not entitled to recover in this action.”

The first, second, and fourth instructions were given, and the third instruction refused, and the plaintiff objected to the giving of the said first, second and fourth instructions, which was overruled by the court, to the overruling of which the plaintiff excepted.

The plaintiff asked for no instructions. The court below gave judgment for the defendants, and the plaintiff made a motion for a new trial, which was overruled and excepted to by the plaintiff. The appeal is brought to this court for the purpose of reversing the judgment of the court below, and of obtaining a new trial, &c.

*F. M. Haight*, for appellant.

I. The ordinance of the defendants is a legislative act, or is to have that construction. It is not a contract between parties, or to be construed by such rules as are applicable to a contract. It is a legislative act, which the municipal authority had a right to enact, and is presumed to be passed upon sufficient consideration and for sufficient reasons, if that were necessary.

II. The defendants can gain nothing, nor take any advan-

tage of the omission, neglect, or refusal of the chairman of the board of trustees to enter satisfaction or carry out the ordinance.

III. The plaintiff offered to show that the ordinance was intended for his benefit. The defendants had made this issue by their answer.

IV. A discharge of two of the defendants discharged the judgment. The payment was joint, and there could be no discharge of one, or satisfaction as to one, without discharging all.

V. A compromise, carried into effect by payment of the composition, is a valid and effectual contract. An agreement for composition is a valid agreement, if made with that view, and for a sufficient consideration. If intended to be a discharge, it is one. 1 Smith's Leading Cases, 258-9.

*E. Casselberry*, for same.

On the payment of the costs specified in the ordinance, the judgment should have been credited with sixty per cent, as specified in the ordinance, as a matter of right; and when the plaintiff paid the costs, as has been shown in evidence, he had a vested right in the sixty per cent. specified in the ordinance. The executions are credited with the amount made on the last two executions, as well as the amount on the first. The defendants, after giving the credit to the plaintiff for the amount made upon the last two executions, cannot afterwards withdraw the credits again, especially as the property was sold by the defendants, as the property of the plaintiff. When the property was deliberately sold as the property of the plaintiff, the defendants are estopped from denying the title of the plaintiff to it.

It will be found, by comparing the returns on all the executions, that the plaintiff was mistaken in saying that he had no interest in the real estate sold on the last two executions, because there were several tracts sold on the second and third executions that were not sold on the first. The declarations of the plaintiff should have been in writing, to be bind-

ing on him, because it concerns his interest in real estate. It would certainly be a great hardship if debtors were compelled to show title to all of the real and personal property sold on execution, before receiving the benefits of the sale. They might have to maintain as many law suits as there were tracts of land sold on the execution—the expenses of which, in many instances, would amount to more than the proceeds of the sale. If the defendants had never made a sale of the property, as the property of the plaintiff, they never would have had the money in controversy, and consequently the plaintiff is entitled to it, because he is the cause of its being made. As the money certainly does not belong to the defendants, the mere fact that the plaintiff was harassed, vexed, and troubled, and in reality injured in his business, by having the executions issued against him, is sufficient to entitle him to the money, in the absence of any other owner, since the defendants have passed the amount to his credit on the executions, and thereby acknowledged his right to it. If the plaintiff is entitled to the benefit of the sales on the executions, in any particular, he is entitled to such benefit in every respect whatever. That he is entitled to the benefit of the credit endorsed on the executions, is not denied. To allow him this benefit is an acknowledgment of his right to the remainder of the money, after satisfaction of the judgment.

*R. M. Field*, for respondent.

I. There was no error in excluding the evidence proffered by the plaintiff below, as to the intent and meaning of the ordinance passed by the corporation. For the ordinance, being the act of a deliberative body representing the corporation, must be judged by its own terms, and could not be enlarged or in any way changed in its interpretation by any testimony of witnesses.

II. The ordinance did not discharge the plaintiff below from the judgment against him.

1. It purports on its face to be passed for the relief of the sureties only.

2. It contains merely directions to the officers of the corpo-

ration, in respect to their action upon the judgment against Barada and his sureties ; and whether the officers have complied with these directions, or have properly declined to do so, is only to be enquired of between them and the corporation ; third persons have nothing to do with the matter.

3. Considering the ordinance in the most favorable light for the plaintiff below, it amounts only to an agreement to discharge the judgment on payment of a lesser sum. Such an agreement is void in law. *Cumber v. Wane*, 1 Smith's Leading Cases, 146, and additional cases there cited.

III. It is insisted that, as the evidence below showed that the plaintiff had no estate or title whatever in the land sold on the execution, he had no equitable right to recover the money made by a sale under the execution, particularly as he appeared at the sale, and disowned all interest in the land, and warned all persons from bidding.

IV. Adopting the construction of the ordinance contended for by the appellant, it is insisted that the board of trustees had no legal authority to pass the ordinance in question ; for it amounts to giving away the money of the corporation at the pleasure of the board. For the powers of the board of trustees, which are strictly defined by law, see Rev. Stat. 1825, tit. Towns, sec. 5. Ib. 1835, tit. Towns, sec. 7. Ib. 1845, tit. Towns, sec. 7. *Rumford v. Wood*, 13 Mass. Rep. 193, 198. *Shronk v. Supervisors*, 3 Rawle, 347. *Parsons v. Goshen*, 11 Pick. 396. *Stetson v. Kempton*, 13 Mass. Rep. 272. *Norton v. Mansfield*, 16 Mass. Rep. 48. *Hooper v. Emery*, 2 Shepley, 375. *Hodges v. Buffalo*, 2 Denio, 110. *Halstead v. New York*, 3 Coms. 430.

SCOTT, Judge, delivered the opinion of the court.

1. The plaintiff in this case presents himself in rather a singular attitude. He is seeking to recover money, to which he alleges he is entitled, and yet he disclaims all title to the property whose sale has given rise to this action. There is an execution against property ; it is sold under that execution ; the defendant in the execution denies that he has any title to it ; it



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does not appear that he is even in possession of it; and yet he claims the money arising from the sale. The principle is not perceived on which the action can be maintained. It is not contended that where there is a title to real estate, a parol disclaimer can divest it, or that, after such disclaimer, the party may not show title in himself, if he has not, by his conduct, estopped himself from such a course towards third persons who have contracted on the faith of such declarations. But here, there is no pretence of title to the property, and an admission is made on the trial of this cause, that there was none in the plaintiff.

The other Judges concurring, the judgment will be affirmed.

*F. M. Haight*, on petition for rehearing. The part of the petition which prays for a mandamus and injunction is undisposed of, and there is still a balance upon which defendants threaten execution, unless the ordinance is valid and operates for the plaintiff. The validity and effect of the ordinance must be passed upon.

SCOTT, Judge. 2. The new code simply provides that the remedy by *mandamus* shall not be affected by anything contained in it, until the legislature shall otherwise direct. This remedy not being affected by the code, the rule as to the joinder of different causes of action does not apply to it, and from the nature of the remedy, it is obvious that it cannot be joined with other actions.

3. As to the injunction prayed for, it is evident that the matter was not passed upon by the court below, nor was it brought in any way to its notice. Should this court now interfere, it would be an exercise of original jurisdiction.

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CHILDS AND CHILDS, Defendants in Error, vs. SHANNON'S ADMINISTRATOR, Plaintiff in Error.

1. A. commenced a suit against a steambot, under the Boat and Vessel act. B., the owner of the boat, as principal, and C and D as sureties, bonded the boat. Pending the suit, B. died. After judgment against the boat, on motion, a judgment was rendered

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against B.'s administrator on the bond. The administrator was not made a party to the proceeding, nor did it appear from the record that he had any notice of it. *Held*, the judgment against the administrator is not *void*, and however erroneous it may have been, no advantage can be taken of the error, except by a direct proceeding to reverse or set it aside.

*Error to St. Louis Circuit Court.*

The opinion of the court contains a sufficient statement of the facts.

*J. A. Kasson*, for plaintiff in error.

1. Judgment could not go against the administrator of the bondsman for damages adjudged against the boat. The authority for so rendering a judgment is purely statutory in any case, and it can only be rendered in a case within the statute, in terms. The case of the death of one of the bondsmen is not provided for. It is a *casus omissus*. Here, the death was before any liability had been incurred on the bond, and there was no debt against the intestate, at his death. He died before verdict rendered. The practice act does not supply the omission. Boat and Vessel act, secs. 9 and 21. Practice at Law, Art. 5, secs. 2 to 7 inclusive. Ib. sec. 20 and secs. 15 to 17 inclusive. 3 Yerg. 413.

2. But if judgment could be rendered against the administrator of a deceased bondsman in such a case, the administrator is a new party and entitled to notice or an opportunity to be heard. The whole proceeding, as to this administrator, was utterly void. *Harrington v. People*, 6 Barb. N. Y. Sup. Ct. Rep. 610. *Buckmaster v. Carlin*, 3 Scam. 104. *Smith v. Ross & Strong*, 7 Mo. 465. *Anderson v. Brown*, 9 Mo. 646. *Newson v. Lyan*, 3 J. J. Marsh, 440.

3. Parol evidence is inadmissible to supply the wants of the record. *Noyes v. Butler*, 6 Barb. Sup. Ct. Rep. 617.

4. There was an improper classification of the demand. It was not legally exhibited until the second year of the administration.

*T. Polk*, for defendant in error.

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The court will presume every thing to support the judgment of the court below, unless it is precluded by the entries on the record. If, therefore, a *scire facias* or a formal appearance was necessary, before a judgment could be rendered against the appellant, Woodruff, in the case of N. & D. J. Childs against the steamer Lamartine, this court will presume that one or the other of them existed. *Shumway v. Stillman*, 4 Cow. 296. The question here is, not whether error is apparent on the record of the judgment, but whether the judgment is *void*. However erroneous it may have been, the defendant could only take advantage of it by appeal or writ of error. Judgment rendered against a person after his death is not necessarily void, but only erroneous. *Warder v. Tainter*, 4 Watts, 278.

The testimony of Mr. Crockett and Mr. Polk shows that the administrator of Shannon did in fact appear in the action in place of his intestate. He will, therefore, not be allowed to dispute the validity of the judgment. 7 Mo. Rep. 162. *Starbuck v. Murray*, 5 Wend. 160. It may be objected that the record does not show that Woodruff was formally made a party. To this it may be replied, that it does not show that Shannon himself, in his life time, was a party. He was never served with process, and never entered his appearance.

But when suit is instituted against a boat, and persons come in and enter into bond approved by the clerk, as was that of Shannon, Wood, and Shaw, in this case, the statute enacts that such intervention shall justify a judgment against them, just as it authorizes judgments to be rendered, in an appeal case from a justice of the peace against the sureties in the appeal bond, as well as against the appellant. Although the boat is the party on the record as defendant, the judgment must be entered up, not against the boat, but against the bondsmen. Stat. of 1845, page 182, section 9, and page 185, section 21. Now, the liability on the bond, being one arising upon contract, does not die with the obligor, but survives against his administrator and follows his estate. But the statutory

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provisions for bringing in the representatives of persons, who die while proceedings in court are pending against them, have reference only to defendants as parties to suits. Stat. of 1845, page 823. It is urged that no judgment could have been rendered against Shannon's administrator, even though brought into court. This objection might be permissible, if this were an appeal from the judgment so rendered. But as it is not, the only objection that can be made to it is, that it is void. The appellant cannot assign for error the admission of the evidence objected to by him, because the bill of exceptions does not show the specific grounds, nor any grounds of objection. *Cornelius v. Grant*, 8 Mo. Rep. 59. In any event, the evidence was admissible, as showing an appearance in fact by the administrator. It did not contradict the record, but, on the contrary, was perfectly consistent with it. The demand arising on the judgment was properly classified. Letters of administration were granted to Woodruff, on Shannon's estate, on the 15th of May, 1849, and the judgment against him was rendered on the 23d day of March, 1850, within a year.

SCOTT, Judge, delivered the opinion of the court.

1. This was a proceeding, begun in the Probate Court of St. Louis county, by the defendants in error, against the plaintiff in error, as administrator of A. Shannon, deceased, for the purpose of obtaining satisfaction of a judgment rendered in the Circuit Court of St. Louis county, against the plaintiff in error. The demand being recognized by the Probate Court, on the appeal to the Circuit Court, the judgment of the Probate Court was sustained, on which this writ of error was sued out. The defendants in error commenced suit in the Circuit Court of St. Louis county, against the steamboat *Alphonso de Lamar-tine*, which being seized, she was bonded by the intestate, A. Shannon, being one of the owners, as principal, and two others, as sureties. A judgment was rendered against the boat. Previous, however, to the rendition of the said judgment, the intestate, who had appeared and made defence for the boat,

died, and his death was suggested on the record. Afterwards, on motion, a judgment was rendered against the plaintiff in error, as the administrator of A. Shannon, deceased, and his two sureties. The administrator was not made a party to the proceeding, nor does it appear from the face of the record that he had any notice of the suit. This judgment is the foundation of the proceedings in the Probate Court, and the question is, whether it is a nullity, or whether it is voidable merely. If the judgment is void, it is clear that it may be regarded as a nullity, in a collateral proceeding, and the objection may be taken whenever it is produced in evidence for any purpose. But if it is voidable only, it will stand good until it is reversed or set aside by a direct proceeding for that object, instituted on the judgment itself, in the court in which it was rendered.

In the case of *Merrick & Webster v. Greeley & Gale*, 10 Mo. Rep. 106, it was decided by this court, that the sureties in a bond, given to release a boat seized under a complaint, were required by law to take notice of the proceedings against her, and that it was not necessary to give them notice of any step taken in the cause. Now an owner of a boat, who appears and makes defence for her, is no party to the suit. His office is like that of an attorney of a court of record. Had Shannon been alive, it would not have been necessary to have served him with notice of the motion for judgment on the bond. It will not be contended, that the death of Shannon discharged the bond. Now, if the merits of the judgment against the boat cannot be re-opened, in a proceeding on the bond, is it not a matter of perfect indifference whether the judgment is entered on a motion or in a suit on the bond? Is there not as much warrant in the boat law for the one course, as for the other? Had this question been propounded to the general assembly, is there any doubt but that they would have declared, that the judgment should be rendered against the administrator, on motion? Can we suppose, that the legislature would take from the hands of a creditor the boat which he had seized in

satisfaction of his demand, and substitute a bond therefor, and require him, after he had obtained judgment for his claim, to commence suit on the bond, in order to obtain satisfaction?

Here is a proceeding in the highest court of original jurisdiction known to our constitution and laws; it is pending for years; a judgment is pronounced, and now we are called upon to pronounce that proceeding an utter nullity, and regard it as though it had never taken place. *Interest reipublicæ ut sit finis litium*. The court unquestionably had jurisdiction of the subject matter of the suit. Whether notice should have been given, was a question of law; the court may have committed an error or irregularity in not requiring it, but it does not therefore follow that its proceedings are a nullity. It would be a strange state of things, if the judgments of the courts of the highest jurisdiction should be regarded as nullities for any error or irregularity in their proceedings. The party to whose prejudice an error has been committed, is not without redress. He may have the proceedings set aside, on motion, or he may sue out his writ of error. If these remedies are neglected, he cannot expect that the courts will treat as nullities, the judgments of the tribunals of the highest original jurisdiction known to the law. The case of the *Perpetual Insurance Company v. Rogers*, 11 Mo. Rep. 295, grew out of an irregular judgment of the Circuit Court of St. Louis, in a proceeding under the statute concerning boats. In that case, a judgment of condemnation, it appeared, had been pronounced against a boat without authority of law, and she was sold, notwithstanding she had been regularly bonded; yet, in an action of trespass against the party, this court held, that the procedure was not a nullity; that the judgment was the act of a court of general authority, having jurisdiction of the subject matter, and, as such, was a sufficient warrant for the execution under which the boat was sold.

The judgment being rendered against the administrator



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within twelve months from the date of the letters, was properly placed in the fifth class.

The alleged errors in the proceedings in the case against the boat, cannot be reviewed on this writ of error. The other Judges concurring, the judgment will be affirmed.

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SCHAFER, Respondent, vs. FALDWESCH, Appellant.

1. In a proceeding under the new code, to recover personal property, the value of the property need not be stated in the petition, if it is stated in the affidavit; nor is the omission of the jury to find the value a fatal error.

*Appeal from St. Louis Law Commissioner's Court.*

H. N. Dedman, for respondent.

1. It is not true, as assigned for error, that there is no allegation of value in the respondent's petition.
2. If there were no allegation of value, the defect is cured by the verdict. See Rev. Stat. act to regulate practice at law, article 6, section 7, page 827.
3. As to the regularity of the proceedings on the bond, see New Code of Practice, article 8, section 9.

RYLAND, Judge, delivered the opinion of the court.

This was a proceeding under the practice act of 1849, to recover personal property, a horse, stated in the petition to belong to the plaintiff; and stated in the affidavit attached to the petition, to be worth seventy-five dollars.

The answer denies that the plaintiff found his horse in defendant's stable, or that the plaintiff ever demanded his horse of the defendant, or that the plaintiff's horse ever was in possession of the defendant. A trial was had, and the jury found that the property mentioned in the petition was the property of the plaintiff; and that the plaintiff had sustained one cent damages by the detention of his property.

Judgment was rendered, that "the plaintiff have restitu-

tion of the property mentioned in the petition, to-wit, one bay horse, about seven or eight years old, and about fifteen hands high, and having a mark on the left shoulder, caused by the fistula, and worth seventy-five dollars, and that he recover of the said defendant one cent damages, by the jury, on their verdict, assessed, and also his costs herein expended, and that he have thereof execution."

The plaintiff afterwards gave notice to the defendant, and to the security in his bond, and moved for judgment on the bond against the defendant and his security. This motion was sustained, and judgment rendered against the defendant and his securities on the bond for seventy-five dollars and costs. The defendant afterwards moved to set the judgment aside; his motion was overruled, excepted to, and the defendant brings the case here by appeal.

The only points worthy of our consideration in this case, are the failure of the plaintiff to insert the value of the horse in his petition, and the failure of the jury to find the value of the horse in their verdict; and the rendition of the judgment against the defendant for seventy-five dollars, the value shown in the affidavit.

These questions arise in this case, on account of the new code, which has had the effect, at least, of bringing causes up to this court, at the heavy expense of parties litigant, that, in all probability, never would otherwise have found their way here.

This proceeding contemplates the power of the court to render judgment on the defendant's bond for the return or delivery of the property to the plaintiff, if it be adjudged to the plaintiff. It also requires the affidavit of the plaintiff or some other person for him, to several pre-requisites before the order is made requiring the defendant to deliver the property to the plaintiff. One of these is "the value of the property." In this case, the affidavit states the value. The jury having found the property to belong to the plaintiff, and it not being returned or delivered to him, as required by the order or judgment of

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the court, the only thing for the plaintiff next to do, was to move the court for judgment on the bond of the defendant and his security. He gave the notice required and made this motion. The court sustained the motion and gave judgment on the bond for seventy-five dollars. The defendant moved to set this judgment aside, having resisted the motion in the first place.

The ninth section of article eight of the Code of Practice, declares, that "when a bond is taken, as in this article is provided, it shall be returned by the sheriff and filed in court; and if any such bond shall be forfeited, the party aggrieved may proceed thereon, by motion in open court, at any time within one year after the determination of the original suit, against the obligors in such bond." There is nothing said about the judgment on this motion; what it shall be for; whether for the penalty in the bond, or the value of the property as sworn to in the affidavit, or for the value as it may be proved before the court, or whether the court shall direct the jury to find the value, when they find the right to the property. Indeed, there is a failure to point out, and direct what is to be done, on such a motion. "When the bond is forfeited, the party aggrieved may proceed thereon," is all that is laid down on this subject.

In this case, the court found the value of the horse, without a jury. We cannot say it acted illegally in doing so. We cannot say, that the omission in the jury to find the value is an incurable error. We cannot say, that the petition should, under this statute, allege the value. The affidavit must.

From the whole record before us, we incline to think it safest to affirm this judgment. So much is left to be understood, to be done without any manner or mode pointed out in which to do it, that, in such a general omission to specify the manner, we will take it for granted it was done according to the best discretion of the court, and therefore must affirm this judgment. Such being the opinion of my brother Judges, it is accordingly affirmed.

## DOELLNER, Respondent, vs. Rogers, Appellant.

1. The new code of practice does not abolish the proceeding by *scire facias* to enforce a mechanic's lien.

*Appeal from St. Louis Circuit Court.*

C. C. Whittlesey, for appellant, insisted that the new code of practice abolishes the writ of *scire facias*, as a remedy to enforce a mechanic's lien. He based his argument upon article one, section one; article five, section one; article six, section one; article seven, section two, and article thirty, section four. This writ does not come within the exceptions in article thirty, section six.

Reynolds & Taussig, for respondent.

The writ of *scire facias* has not been abolished by statute, but, on the contrary, is expressly preserved in article thirty, section six, of the new code. It is preserved by name as *scire facias*, and as a "special statutory remedy not heretofore obtained by action or bill in equity."

The appellant is too late with his objections, after verdict and judgment. Rev. Code, 1845, tit. Jeofails, sections seven and eight; article six, section six, new code.

Scott, Judge, delivered the opinion of the court.

This was a proceeding under the statute concerning mechanics' liens, to enforce a claim against a building. The only question presented by the record is, whether the remedy by *scire facias* given by the lien law is taken away by the late code of practice.

The sixth section of the thirtieth article of the late act concerning proceedings in courts of justice enacts, that until the legislature shall otherwise provide, this act shall not affect proceedings upon *mandamus*, *quo warranto*, prohibition, information, *scire facias* to repeal letters patent, nor to any special statutory remedy not heretofore obtained by action or bill in equity. The lien created in favor of mechanics, and its mode

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of enforcement, are both mere creatures of the statute. They have no common law authority whatever on which they can stand. It is true that the writ of *scire facias* was known to the common law, but its application to purposes mentioned in the lien law was unheard of. We are of opinion, that the code never contemplated that the proceedings under the lien law should be affected by any of its provisions.

The other Judges concurring, the judgment will be affirmed.

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KENNEDY'S ADMINISTRATRIX, Plaintiff in Error, vs. HAMMOND & HALL, Defendants in Error.

- A. conveyed to B. a mill and leasehold, to secure to C. the payment of two notes. After the first and before the second note matured, the property was advertised and sold, pursuant to the terms of the deed of trust, and D. became the purchaser. After the sale, D. tendered to B. the amount of the note which had actually matured, and produced the receipt of the assignees of the grantor for the balance of his bid, and demanded a deed. B. refused to deliver a deed, and when the second note became due, again advertised the property for sale. D. applied for and obtained an injunction. When the injunction was dissolved, the lease had been declared forfeited and the mill burned down, so that the mortgaged interest would not have sold for enough to defray the expenses of a sale. *Held,*
1. D. had no right to a deed until he tendered the amount of both notes, although one of them had not matured.
  2. Upon the dissolution of the injunction, the damages were properly assessed at the whole amount of the notes, with interest, &c., even though the makers of the notes were solvent.

*Error to St. Louis Circuit Court.*

On November 6th, 1847, James Kennedy filed his bill of complaint in the Circuit Court for the county of St. Louis, sitting in equity, against the defendants, setting forth that Elisha Hall, Judson Allen and Joshua J. Childs, by their deed dated May 15th, 1846, conveyed to John R. Hammond, certain ground, with a steam saw mill thereon, in the city of St. Louis, leased by them from William Chambers for ten years, together with the lumber, tools, &c., on the premises, in trust

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to secure the payment of two certain notes, made by said Hall, Allen and Childs to the defendant, Hall, one for \$1030, dated April 1st, 1846, and payable twelve months after date, and the other for the same sum, and of the same date, but payable eighteen months after date; with power to sell said property, or any of it, in case default was made in the payment of either of said notes at its maturity, at auction, in a certain manner in said deed provided for; that said first named note was not paid at maturity, and thereupon, said Hammond sold said property, in the manner provided for in said deed, and at said sale the complainant, Jas. Kennedy, became the purchaser, at the price of \$2,800. The sale was made June 7th, 1847. That thereupon, as soon thereafter as said Hammond was ready to deliver a deed, said Kennedy tendered to him a sum of money sufficient to pay said first named note, and interest, and all expenses of the execution of the trust, and the receipt for the balance of the \$2,800 from Primus Emerson and Joshua J. Childs, and demanded of said Hammond a deed of conveyance of said property, which the said Hammond had at the time, executed, and ready for delivery, but said Hammond refused to receive said tender, and deliver said deed, and insisted that he should be paid the whole amount of both of said notes; that prior to said sale, said Hall and Allen had assigned and transferred said leasehold property to Primus Emerson, and at the time of said sale, and said tender, said Childs and Emerson were the sole owners of said leasehold, which was known to said Hammond; that afterwards, when said second note became due, said Hammond again advertised said property to be sold October 6th, 1847, under said deed of trust; and by reason of the premises, the complainant prayed for an injunction of said advertised sale, and that said Hammond be decreed to make and deliver to him a deed of conveyance of said property, by virtue of his said purchase thereof, and tender aforesaid, he being ready and willing, as he always had been, to satisfy his bid to said Hammond as aforesaid, for said property.



An injunction of said sale was granted October 6th, 1847, with the usual security bond. The defendants filed their several answers to said bill, admitting the allegation of facts set forth in the bill, substantially, but setting up that no such evidence of the alleged sale to Kennedy was made as required by the statute of frauds; that the property was indivisible, and that its transfer by Hall and Allen to Emerson was made subject to the deed of trust, and that Childs and Emerson were of doubtful circumstances at the time of the sale, and that their receipt for the balance of the \$2,800, bid by Kennedy for the property, was a fraudulent contrivance with Kennedy for depriving the defendant, Hall, of his security, by said property, for the payment of said notes. The deed of trust is filed as an exhibit, and in the answer of said Hall, the following provision therein is set forth, to-wit: that upon a sale thereunder, said Hammond should receive the proceeds of the sale, and out of them pay, first, the expenses of executing the trust; next, the sum due on said notes, or either of them, and lastly, should pay the balance, if any, to the grantors in said deed of trust.

To these answers the complainant filed a replication. Afterwards Kennedy died, and his wife, Amelia, being administratrix of his estate, was made complainant in his stead.

Upon the hearing, it was admitted that Kennedy, within a proper time after the sale, made to Hammond the tender alleged in the bill, and that Hammond knew, at the time, that Childs and Emerson were the sole owners of the property, as alleged, and that, at the time of such tender, Hammond had, executed and ready for delivery, a deed of conveyance of the property to Kennedy, but refused to deliver it, upon such tender, on the grounds that the tender should be of enough money to pay both notes, and interest accrued thereon, and the expenses of the execution of the trust.

Also, that the property was incapable of a division, and had to be sold together, and that, at the time of sale, and still, neither of said notes had been paid. Thereupon, to-wit,

December 2d, 1850, the court decreed a dissolution of the injunction and a dismissal of said bill, with costs, and, upon motion of defendants, an assessment of damages by a jury was ordered.

The complainant moved the court in proper time for a rehearing, which was refused by the court, to which refusal the complainant duly excepted.

Upon the inquiry of damages, had December 3d, 1851, evidence was by the defendants introduced showing the following facts, to-wit: that the premises were leasehold, under a lease from William Chambers to Elisha Hall, said Childs and Allen, for ten years, with a condition of forfeiture, for the non-payment of rent, as agreed; that in March or June, 1847, the premises were forfeited for the non-payment of rent, and shortly after, a suit was instituted to enforce said forfeiture, which was still pending; that upon the premises was a saw mill, driven by steam, which cost \$5000 to \$7000; that during the pendency of the injunction, the mill burned down, and that its remains were worth from \$1200 to \$1500, all of which had been disposed of or was dispersed; that the lessor, after the fire, which occurred in August, 1849, took possession of the premises, and let them to others, who have, ever since, had possession thereof. Isaac H. Sturgeon, a witness, testified that in his opinion an auction sale of the premises, in its then condition—a suit pending to declare a forfeiture—would not have brought the expenses of the sale, if any body would have given any thing at all.

Defendants further introduced evidence to show, that after the execution of the deed of trust, Allen sold his interest to Childs and Emerson, subject to the payment of the debt, mentioned in the deed of trust; afterwards Elisha Hall sold all his interest to Childs and Emerson, subject to said debt; Childs afterwards sold out to Emerson, and Emerson to John Maguire, in like manner, subject to said debt. All these transfers were before the sale, except the last, which was shortly after; that Maguire had been in possession before the fire,

and had rented them for \$2000 per annum, and procured insurance and received the insurance upon it. The deed of trust contained a stipulation that the mill should be insured for the benefit of the creditor. It appeared that Kennedy purchased for Maguire, and that the present suit was for his benefit.

The notes were read to the jury, and it was proved that the printer's bill, for advertising the last sale, was eight dollars, and defendants' reasonable attorneys' fees for defending, were fifty dollars.

It was proved that Hall and Allen had all along been, and still were, worth \$3000, and residents of the city of St. Louis. This was all the evidence. For the complainant, the following instructions were asked.

1. In this case, the defendant is not entitled to recover for damages to exceed ten per centum upon the amount of the debt.

2. The defendants are not entitled to any damages, by reason of the burning of the saw mill pending the injunction.

3. If the jury believe from the evidence, that the parties, or any of them, to the notes in evidence, are and have been solvent and good for the notes, then the defendant is entitled to recover only for what he has proved he has paid out and incurred properly in defending this suit, and advertising the sale in October, 1847.

4. If the jury believe from the evidence, that the lease from Chambers to Hall, Allen and Childs, was forfeited before the commencement of this suit, then the burning of the saw mill is no evidence of damage to the defendants.

5. If the jury believe from the evidence, that the parties, makers of the notes given in evidence, or any of them, are and have been continually solvent, then the burning of the mill, during the pendency of the injunction, is not sufficient evidence to enable the defendants to recover damages, by reason of such burning.

These instructions the court refused to give, to which decision of the court the complainant duly excepted.

On behalf of the defendants, the following instruction was asked and given, to-wit :

"If the jury find that the premises mentioned in the deed of trust were, at the time fixed for the sale of said premises, which was enjoined, a sufficient security for the debt mentioned in said deed, and since the said time, and before the dissolution, said premises have been forfeited, destroyed and dispersed, so that the same could not be sold under said deed for a sum sufficient to defray the expenses of sale, then the jury ought to find the damages in this case to be the whole amount of the debt, and interest down to the present time, and such expenses as are proved to the satisfaction of the jury, to have been incurred in advertising the second sale under the trust deed, and for counsel fees in resisting the injunction."

To the giving of this instruction the complainant duly excepted. The jury assessed for the defendants, \$3,385 33. The complainant, in due time, filed a motion to set aside said assessment, for the following reasons, to-wit :

1. Because the court erroneously admitted irrelevant testimony.
2. Because the court erred in giving the instruction asked for by the defendants.
3. Because the court erred in refusing to give the instructions asked for by the complainant.
4. Because the verdict is against evidence—the weight of evidence—against the law under the evidence, and is excessive.

The court refused to grant this motion, to which decision of the court the complainant duly excepted, and sued out a writ of error to this court, to reverse the final judgment of the court below, which was a dissolution of the injunction, a dismissal of the bill with costs, and that defendants recover of plaintiff the amount assessed by the jury.

*Todd & Krum*, for plaintiff in error.

- I. The court erred in dissolving the injunction and dismissing the bill, for, by the terms of the contract of the parties, as set forth in the deed of trust, it was contemplated that there

might be a default in making payment of the first note, and if so, and the holder saw fit to avail himself of the power to sell the property to make the money before the other note became due, it was agreed in terms that out of the proceeds of the sale, should be paid, first, the expenses of the execution of the trust, next, not both notes, but the sum due on said notes, or either of them, and the balance over, if any, to the grantors.

The authorities cited for the doctrine that the proceeds might be applied to pay both notes, although not due, so far as known to us, are in cases of bonds and mortgages or other obligations, which become forfeited, or, technically, in full and present force, by a single default, with no words of agreement in restraint of, or inconsistent with a satisfaction of the whole debt, due or not. The case of *Salmon v. Clagett*, 3 Bland's Ch. Rep. 125, is a case different from this in its objects, and gave no occasion, it is insisted, for the remarks on pages 179 and 180, and, therefore, they are only a *dictum*, and as a *dictum*, they are not supported by the authorities referred to at the bottom of page 180. These cases, for the most part, are of the kind above stated, and one of them decides, in effect, that when words of restraint are used, their benefit and protection shall be enjoyed. 1 Maul. & Sel. 706; and another case of them, 4 J. Ch. R. 534, is decided under the express words of a statute, which shows that in New York it was deemed necessary for legislative action to authorize the doing of such an act as contended for by the defendants in this case, even in cases of bonds and mortgages in which are no words of restraint. The decision in 7 Paige Ch. Rep. 248, is in a case of a bond and mortgage, and under statutory regulations.

The practice in drawing deeds of trust, to secure the payment of money coming due at different times, when it is intended, that, in case of a single default, the whole money shall be due, or that the proceeds of sale shall be applied to the payment of the whole, whether due or not, is to so provide in express terms, in the deed of trust.

While the law permits sane men, of full age, to make contracts, their advantages and disadvantages, when free from fraud and lawful, no court has a right to interfere with, and least of all, to make and impose new and different contracts upon the parties, with additional benefits and advantages to the one side, and additional burdens and disadvantages to the other. To do it, is a mere usurpation of power, and a gratuitous guardianship. 19 Wend. Rep. 522. Wright's Ohio Rep. 523, 524.

As to the defence that the sale was not in writing, within the requirements of the statute of frauds and perjuries, it is insisted,

1. That Hammond's relations to the grantors and their assigns of the one part, and the defendant, Orris Hall, *cestui que trust*, of the other part, were, in principle, like those of an auctioneer or broker, so that a written memorandum of the sale, by him signed, was of the same effect as if signed by both parties. The deed of conveyance that, it is admitted, he actually executed to the complainant, and had, ready acknowledged, for a delivery to him, in pursuance, and according to the terms of the sale, was a full compliance with the statute.

As to the charge of fraud and insolvency in the answer, no evidence thereof was given, or offered upon the final hearing of the case, when the court decreed the dissolution, dismissal, and ordered an inquiry of damages.

II. The court erred in not giving the instructions Nos. 1, 2, 3, 4 and 5, asked for by the complainant. No. 1 ought to have been given, because the thing enjoined was money, in the contemplation of section 13 of the act regulating injunctions, p. 580, of the Revised Code of 1845.

No. 2 ought to have been given, because there was no evidence that the money was not collectable of the makers of the notes, notwithstanding the security by the deed of trust was nearly or quite destroyed by the loss of the saw mill.

If this case is not one of money enjoined within the contemplation of the statute, then No. 3 ought to have been given,



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because the items of damage therein specified are the only ones of which there is evidence.

No. 4 ought to have been given, because a forfeiture of the lease was an annihilation of the security, and, therefore, the burning of the saw mill was of no damage to the security.

No. 5 ought to have been given, because if the notes were collectable of the makers, or any of them, the burning of the saw mill was merely a speculative damage at most, or, in other words, merely argumentative—not certain but contingent, not probable but only possible.

III. The court erred in giving the instruction asked on behalf of the defendants,

1. Because of the reasons already given under point 1.

2. Because it is predicated on the supposition that after the injunction was obtained, the lease had been forfeited, whereas the only evidence thereof was that of Sturgeon, to-wit: "that it was forfeited in March or June before." This was a material fact in ascertaining the damages, and one for which the complainant was in nowise accountable.

IV. The assessment is manifestly excessive and unjust, because it covers more than damages; it gives a satisfaction of the debt and damages, and the complainant is thus made to pay the debt of another, without a contract or any recourse or redress. The statute only gives actual damages, not uncertain or contingent damages.

V. The court below erred in the instructions given and refused, on the assessment of damages, touching the *mea s ur* thereof. 11 John. Rep. 136. 14 ib. 213. 17 Wend. Rep. 554. 3 Denio, 232.

*Field*, for defendants in error.

I. The court below committed no error in its decree rendered on the hearing; for it is plain that the trustee was entitled to demand the amount of both notes, though only one had arrived at maturity.

It is the settled practice of chancery, in cases where the property is not susceptible of division, and the mortgage debt is

payable by instalments, to decree a sale of the whole mortgaged premises and pay off the whole debt, rebating for the interest on what may be due, but not yet payable. *Salmon v. Clagatt*, 3 Bland's Rep. 179, and the numerous cases there cited. *Knapp v. Burnham*, 11 Paige, 330.

Equity regards the money realized from the sale, as the primary fund for the payment of instalments not yet due, as the effect of the sale was to disincumber the estate of the mortgage, which before stood as a pledge for the debt. *Kimmell v. Willard*, 1 Douglass (Mich.) Rep. 217. See also, to same effect, *Mussina v. Bartlett*, 8 Port. Rep. 277. *Baker v. Lehman*, Wright, 522.

The rule is the same where the foreclosure is by the mortgagee under a power of sale. *Cox v. Wheeler*, 7 Paige, 248. *Hall v. Bamber*, 10 ib. 297. See 2 Rev. Stat. N. Y. p. 449, 450, 451.

The whole force of the complainant's case lies in the mistaken sense of the word "due," as used in the trust deed. It is apparent that the word, as there used, is not synonymous with "payable," but is intended as the adjective of debt, and of course includes all of both notes that was unpaid.

For an illustration of the different senses of the word "due," see *U. S. Bank v. Bank of N. C.*, 6 Pet. 29. *Hoyt v. Hoyt*. 1 Harr. N. J. Rep. 138.

II. There was no error in the action of the court below on the assessment of damages. The security for the debt was wholly lost by the injunction. The damages, therefore, ought properly to include the whole amount of the debt.

The provisions of the statute, limiting the amount of damages for the detention of money by injunction, are obviously not applicable here. Nor is it of any importance that the leasehold estate, covered by the deed of trust, had become forfeited at law, for it still subsisted in equity. Nor is it important, that the grantors in the trust deed are responsible for the trust debt. The defendants have a right to insist on the value of the security of which they have been deprived by the plaintiff.

The certainty of collecting the notes has been reduced to a chance.

Besides, it is unquestionably the duty of the plaintiff to exhaust the trust fund before resorting to the personal responsibility of the makers of the notes. For Maguire had become the real debtor, and he has no equity to turn us around upon those who are merely securities. Besides, if the notes ought now to be paid by the makers, the most that he could ask for, would be the right to have the notes transferred to him; but this he did not ask for, and certainly, under the circumstances, it should not have been ordered.

The expenses of advertisement and counsel fees incurred in resisting the injunction, are proper to be allowed in damages. *Edwards v. Bodine*, 11 Paige, 223. *Aldrich v. Reynolds*, 1 Barbour, 613.

So, where, pending an injunction restraining a trust sale, the mortgagor took off the crops, the value of the crops was allowed in the damages on the dissolution of the injunction. *Aldrich v. Reynolds*, *ubi supra*.

RYLAND, Judge, delivered the opinion of the court.

From the above statement, the assessment of damages upon the dissolution of the injunction, becomes the main point for the consideration of this court.

This injunction cannot be said to be a proceeding to restrain the collection of money, in this case. Here, there was no judgment at law, the enforcement of which, by execution, was restrained and enjoined. Sections 11 and 13 of the act concerning injunctions, Rev. Code, 1845, are as follows:

“Sec. 11. No injunction shall issue in any case, until the complainant execute a bond with sufficient security, to the other party, in such sum as the court or judge shall deem sufficient to secure the amount, or other matter to be enjoined, and all damages that may be occasioned by such injunction, conditioned that the complainant shall abide the decision which shall be made thereon, and pay all sums of money, damages and costs,

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that shall be adjudged against him, if the injunction shall be dissolved.

"Sec. 13. Upon the dissolution of an injunction, in whole or in part, damages shall be assessed by a jury, or, if neither party require a jury, by the court; but if money shall have been enjoined, the damages thereon shall not exceed ten per centum on the amount released by the dissolution, exclusive of legal interest and costs."

On judgments at law, the dissolution of an injunction restraining the collection of the money, can allow of damages being assessed, at not more than ten per cent. That, in addition to legal interest. It is obvious that, in some cases, when injunctions have been granted to restrain an act from being done other than to collect money, such as the one in this present case, the damages may necessarily be much greater than the delay of receiving a sum of money for a few months could ordinarily produce; and if damages only can be measured by per cent., in many cases there would be no criterion to ascertain them by. From the words of the act, too, we can see, that to restrain the collection of money, was not alone in the mind of the legislators. "Amount or other matter to be enjoined." Here, the complainant below did not seek to enjoin and restrain the defendants from the collection of a judgment or of a sum of money, but to prevent them from proceeding to sell property, the trust fund, and in that act, on the part of the complainant, serious injury may have been committed; no less than the destruction in a greater or less degree of the value of the entire fund; and can it be said, that ten per cent. is to be the amount of damages to be awarded, on the dissolution of an injunction in such cases? Ten per cent. on what? The original debt, for the payment of which the trust was made? That will not do. Nor can the defendants be compelled to resort to the bond on which that injunction was originally allowed. The condition of the bond is, "pay all sums of money, damages and costs that shall be adjudged against him,

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if the injunction be dissolved." Now, before suing on this bond, after dissolution, "the damages must be adjudged," and the non-payment of the amount adjudged forms the breach of the bond, so far as damages are concerned. -

No argument can be drawn from the liability arising on the bond, in order to ascertain how, and what amount of damages must be adjudged. The bond is to secure the payment of the money when adjudged. The trust property in this case was sold at the maturity of the first note; that note was for something over one thousand dollars.

The property was incapable of division. It was sold entire. The property was liable to be sold on the default of payment of either of the notes. The complainant's intestate, James Kennedy, became the purchaser, for \$2,800. Shortly after the sale, he offered to Hammond, the trustee, one of the defendants below, the money to pay the amount of the first note, interest, and costs of advertising, and expenses of sale, &c., with a receipt from Emerson and Childs for the balance of the \$2,800, and demanded a deed. Hammond refused to accept the tender, or to make a deed until the full amount of the debt secured by the property was paid. Now, what right had Emerson and Childs to receive the proceeds of this trust sale over the above notes? Say the trust property, that is, the lease on it, had been assigned to them; they took it, with the incumbrance upon it. Now, if this sale, on the maturity of the first note, passed the entire interest in the trust estate to the purchaser, free from the incumbrance of the second note, then that sale, if Emerson and Childs had a right to receive the amount over the first note, and expenses, was an injury to the *cestui que trust*, instead of a benefit; for by it he lost the security for half the debt originally secured by this trust property.

At the maturity of the second note, steps were taken to sell the trust property; then the complainant below steps in, and by his bill prevents the sale by injunction. Upon the dissolution of this injunction, the trust property being destroyed, partly

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by fire, and the lease forfeited to the original lessor ; the trust property, I may say, lost to the *cestui que trust*, the damages in consequence were assessed at the amount of the debt originally secured and interest, and I think very properly.

Let us look at the facts in this case. Hall, Allen and Childs were the proprietors of the lease from Chambers, of the steam saw mill. They gave their deed of trust on the property to secure two notes. Afterwards, Hall sold all his interest in the premises to Childs and Emerson, expressly subject to the debt mentioned in the trust deed. Then Allen sells his interest in the property to Childs and Emerson, in like manner subject to the payment of the debt. Then Childs transfers the property to Emerson, subject to the payment of the debt. Lastly, Emerson transfers the property to John Maguire, in the same manner, subject to the debt ; so that Maguire becomes the owner of the property, and, in respect to the prior parties, is the principal debtor, and they merely his securities to the holder of the trust debt. Maguire procures Kennedy to bid off the property at the trustee's sale, and prosecutes the present suit for his own benefit, using Kennedy's name. Maguire has all along been in possession, receiving a large rent, \$2,000 per year, until the mill was burned down in 1849. The deed of trust contained a stipulation that the premises should be insured, and that the insurance should stand as security to the creditor. Maguire collects the insurance for his own benefit. This, too, pending the injunction. So, too, pending the injunction, the landlord enters into the premises for a forfeiture, and Maguire suffers him to keep possession, and to make leases to other parties. Maguire, after making the trust debt his own, appropriates the security for the debt, to his own use, and insists that the original creditor, Orris Hall, shall look to the makers of the notes individually, and not to the trust fund.

The notes are still due ; the trust property was sold ; Maguire gets possession through Kennedy's purchase, pays no part of the debt for which the property was sold, rents out this



very trust property for \$2,000 a year, and indemnifies Kennedy to prosecute this proceeding, in which the injunction was obtained. Had the second sale proceeded, the debt in all probability might have long ago been made out of the trust property. Pending this proceeding, that property has become lost to the *cestui que trust*, and, because the original makers of the notes are supposed to be worth \$3,000, Maguire contends that the *cestui que trust* has not been damaged, and that he must look to the notes.

The case in 11 Johns. Rep. 136, *Yates v. Joyce*, has not any, or but slight application to any principle involved in this case. That case has the following head note: "Where A., the assignee of a judgment against B., which was a lien on the property of B., was about to take out execution, and seize a certain lot of land, and C., knowing this, pulled down and carried away certain buildings from off the land, whereby A. was deprived of the benefit of his judgment, &c., it was held, that A. might maintain an action on the case against C. for fraudulently removing the property of B., and converting it to his own use, with intent to defeat the judgment of A." The court, in the opinion given, said: "It is a sound principle, that where the fraudulent misconduct of a party occasions an injury to the private rights of another, he shall be responsible in damages for the same, and such is the case presented by the pleadings in this cause." In the case of *Lane v. Hitchcock*, 14 Johns. Rep. 213, the court remarked: "This case is supposed to be within the principles which governed the decision in *Yates v. Joyce*, 11 Johns. Rep. 136. In the case now before us, proof was offered on the trial, that the mortgagor was insolvent, and had no other property than the mortgaged premises, out of which the debt of the plaintiff might be satisfied; but there was no averment in the declaration to warrant such proof. These were material and indispensable facts, in order to give the plaintiff a right of action; and to allow this proof without the averment would take the defendant by surprise." The case in 17 Wend. 554, *Bank of*

*Rome v. Mott*, has still less bearing on the case now before us. So likewise the case of *Gardner v. Heartt*, 3 Denio, 232. The case in 19 Wend. 518, *Glover v. Payn*, was cited for the purpose of warning the courts not to take guardianship of adults as well as infants.

In the case of *Campbell and others v. Macomb and others* 4 Johns. Ch. Rep. 534, the Chancellor says: "The sale of the whole of the mortgaged premises was indispensable in this case, because they were not capable of being sold in parcels or of being divided, without manifest injury to all the parties concerned. When the whole premises are thus necessarily sold, it is the direction of the statute, (N. R. L. 490) that the court apply the proceeds of the sale, not only in payment of the interest, instalment, or portion due, but towards payment of the whole or residue of the demand, which hath not become due or payable, provided the same bears interest. But this provision is made from the necessity of the case, and more than is due is not to be raised out of the mortgaged premises, when that necessity does not exist. If the mortgagor, or the party holding the equity of redemption, comes before the sale, and brings in the amount due, with costs, there is no justice or equity in suffering the sale to proceed. The object of the decree was not to raise any part of the debt not due, yet the raising of the entire debt may become an unavoidable consequence of the sale, because the court, in order to raise what is due, is obliged to sell the whole of the mortgaged premises, as they happen to consist of one entire subject, incapable of being conveniently or safely divided."

The case in 1 Maule and Selwyn, 706, was one of construction of the terms of a defeasance. The defeasance is, "that the plaintiff shall not be at liberty to issue execution until default made in payment of the said sum by instalments, and in the manner before mentioned." It was held, that the failure to pay one instalment was such a default as permitted the execution to issue, and that for the whole debt.

In *Salmon v. Clagett*, 3 Bland's Chan. Rep. 179, the Chan-

cellor said: "Where a debt, secured by a mortgage, is made payable by instalments, it is well settled that the mortgage becomes forfeited by the non-payment of the first instalment, and may be foreclosed immediately after that time. If a bill be filed for that purpose, the debtor may, however, prevent a foreclosure or sale, by paying the instalment then due; but if he fails to do so, then the mortgage may be entirely foreclosed, or so much of the property may be sold as will satisfy the sum due at that time; and the decree will be allowed to stand, as a security for the other instalments as they become due—as in case of a judgment at law for an annuity. But if the mortgaged property cannot be conveniently or safely sold in parcels, then it must be disposed of entire, and the whole debt raised and paid, with a rebate of interest on sums not due at the time of paying over the proceeds of the sale to the creditor. This is done from necessity, and as an unavoidable consequence of the peculiar nature of the case." See also *Knapp v. Burnham*, 11 Paige, 332.

In *Mussina v. Bartlett*, 8 Porter, 284, the court remarked: "It frequently so happens that the property mortgaged consists of one entire parcel, which could not be divided, or would be greatly lessened in value by division. Suppose, in such a case, a decree should be had for a sale before the entire sum intended to be secured fell due, could the mortgagor insist upon being paid the excess produced by the sale? We apprehend not. If he could, the right to coerce a sale upon the first default, instead of being beneficial, would often be injurious to the mortgagee, if he were to avail himself of it; for, having paid over the excess, the premises being sold, his security would be gone, and he thrown upon the personal responsibility of the mortgagor." See *Baker v. Lehman*, 1 Wright, Ohio Rep. 524.

In *Kimmell v. Willard's administrator*, 1 Douglass, Mich. Rep. 223, the court remarked: "We think that the mortgagee might have bidden for the premises when exposed to sale, the whole amount unpaid on the mortgage, whether

for interest or principal; and any attempt on the part of the mortgagor to enforce in a court of law the payment of the difference between the amount actually due, and the amount of the bid, would have been averted by the interposition of a court of equity, which would, under the circumstances, regard the equitable rights of the mortgagee as countervailing the strict legal rights of the mortgagor. In other words, equity would regard the money realized from the sale as the primary fund for the payment of the instalments not due, inasmuch as the effect of the sale would be to disincumber the estate of the mortgage, which stood before as a pledge for the payment of the debt. Upon this point we have no doubt. Again, it would have violated no principle of law to have exposed the premises for sale, charged expressly with the payment of the future instalments. In such case, the sale would have discharged the estate of the mortgage; but still a court of equity would lend its aid to the mortgagee, and regard the estate in the hands of a purchaser as charged with the debt. This aid would be granted, not because of any claim arising out of or by virtue of the mortgage, but in consequence of its having operated so as to discharge the mortgagor from all personal liability; and for the more obvious reason that an agreement would be implied as between the mortgagee and the purchaser, to consider the balance due the former, as a lien in equity upon the premises."

In the case of *Cox v. Wheeler*, 7 Paige's Chan. Rep. 248, it was held by the Chancellor, that when a mortgage is payable by instalments, the mortgagee has a right to sell the premises discharged of the lien of future instalments, and retain the whole amount of his mortgage and costs out of the proceeds of the sale. And if he chose to sell subject to the incumbrance of the instalment, which was not then due, in legal intentment, the premises would bring so much less on the sale, and the purchaser would take the premises subject in equity to the payment of the incumbrance thereon. In such a case, the mortgaged premises become in equity the primary fund for

the payment of the amount of the incumbrance. And if the mortgagee becomes himself the purchaser, the incumbrance becomes merged in his legal estate in the equity of redemption, and the debt is in equity extinguished.

In *Aldrich v. Reynolds*, 1 Barb. Chan Rep. 613, it was held, that the value of the growing crops taken off by the mortgagor, during the time for which the sale of the premises was suspended by an injunction, formed a part of the damages sustained by reason of an injunction staying the complainant from selling the premises under his decree; that the counsel fees, which he was obliged to pay to obtain a dissolution of the injunction, likewise should be included in assessing the damages; the costs of reference to a master to ascertain the amount of damages should likewise be included, and the interest upon the whole sum, the collection of which had been suspended by the injunction.

From the view we take of the subject, there is no analogy between this case and those reported in 11 and 14 Johns., above cited. There, in order to enable the plaintiff to maintain his action against a third party, he must show his injury, and show the intent of the third party in inflicting it. So in the case in 17 Wend.

In this case, in the opinion of this court, the damages were properly assessed, and there is no error in the act of the court below in assuming to give, or in giving the instruction. Its judgment is therefore affirmed, with the concurrence of the other judges.

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CENTRAL PLANK ROAD Co., Respondent, *vs.* CLEMENS,  
Appellant.

1. Under the law of 1851, authorizing the formation of companies to construct plank roads, a stockholder, who assists in the organization of the company, will not be permitted to escape from his liability to pay for his stock, upon the ground that the company was not organized in strict conformity to the law.
2. Nor on the ground that no legal notice was given of the election of directors.
3. It is no defence to a suit for an instalment upon stock in a plank road company, that there has been a departure from the route proposed in the articles of association.

*Appeal from St. Louis Law Commissioner's Court.*

This was a civil action to recover instalments assessed on stock subscribed by Clemens. The petition alleges that the plaintiff is a corporation, duly organized under the act of February 27th, 1851. It also alleges that the defendant and others entered into and subscribed articles of association, for the purpose of owning and building a plank road in St. Louis county, &c., &c., a copy of which articles is made an exhibit in the cause. It also alleges that, after there had been more than enough stock subscribed to amount to the sum of one thousand dollars per mile, a copy of the articles, sworn to by two of the subscribers, was filed in the office of the Recorder of St. Louis county, on the 24th of May, 1851; that each share of stock was one hundred dollars, and that the defendant subscribed for five shares; that the association was duly organized on the 5th of June, 1851, by the election of directors and other officers, according to the act of the general assembly, and that the defendant was present and voted at the election. The petition also states, that calls were made by the directors on the stock of the defendant and others, and that payment was demanded of him according to the act, and prays judgment for the amount of the calls.

The defendant answers and admits that said plaintiff is a corporation, so far as the matters stated in the petition constitute a corporation, provided all stated therein be true, and he also admits that he subscribed five shares of stock. The answer then sets up, that the president and directors of the company, in locating the road, unnecessarily and improperly departed from the route designated in the articles of association. Afterwards, the defendant filed an amended answer, in which he states that he was under a mistake as to certain matters when he filed his original answer, and then alleges that he has been informed and believes the fact to be that the company never was legally organized, so as to become a corporation. The answer then "denies that the amount of stock, as required by law, had been duly subscribed before the election of



officers," and also denies that due notice had been given of the time and place of holding the election.

When the cause was called for trial, the plaintiff moved for judgment on petition and answer, and the court sustained the motion and rendered judgment for the amount for which the defendant was, according to the finding of the court, indebted to the plaintiff.

*T. B. Hudson*, for appellant, insisted that the change of the route of the road, without the consent of Clemens, absolved him from all liability to pay the amount of stock subscribed. 8 Mass. Rep. 268. 10 ib. 393. It was tantamount to an alteration of the charter. 5 Hill, (N. Y.) Rep. 383.

The court below erred in refusing to allow the defendant to show that the amount of stock, as required by law, had not been subscribed. Any one sued by a corporation may deny its legal existence and require proof that it has complied with all the conditions imposed by law. 14 Johns. Rep. 416. 10 Wend. 269.

*Frémon & Reber*, for respondent.

I. The plaintiff is a corporation *de facto*, organized under color of law, and therefore has the right to sue. See session acts of 1850 and '51, page 259. This is all the plaintiff would have to prove on an issue of *nul tiel corporation*. Angell & Ames on Cor. 572.

II. When a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favor of its legal existence. Ib. 573. *Road Co. v. Creeger*, 5 Harris & Johnson, 122.

III. Persons in the possession and actual exercise of corporate rights shall be considered rightfully there, even when the charter is granted on a condition precedent. Ang. & Ames, 58. *Tar River Navigation Co. v. Neal*, 3 Hawks, (N. C.) R. 520.

IV. It cannot be set up in defence to an action by a corporation that the election of the officers was irregular, or that any other preliminary matter had been irregularly done. *Trus-*

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Central Plank Road Co. v. Clemens.

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*tees of Vernon Society v. Hills*, 6 Cowen, 23. *Charitable Association v. Baldwin*, 1 Metcalf, 364. *All Saints Church v. Lovett*, 1 Hall, (N. Y.) 197. *Turner v. Baynes*, 2 H. Blackstone, 559. 19 Wend. 135. *McFarlan v. The Triton Ins. Co.* 4 Denio, 392. *Centre Turnpike R. Co. v. McConaby*, 16 Serg. & Rawle, 145.

V. Nor can it be shown in defence that the charter has been forfeited by nonuser or misuser. *Angell & Ames*, 575, 746. 5 Johns. Ch. R. 366. 5 Ala. Rep. 805. 6 Vermont Rep. 323. 7 Met. 595.

VI. Non-compliance with its charter by a turnpike company, as to the construction of the road, is *per se* a misuser, forfeiting the privileges of the company. *People v. Kingston & M. T. R. Co.* 23 Wend. 193.

In the case at bar, the petition stated sufficient facts to entitle the plaintiff to recover, and the defendant specifically denies no material allegation in his answer. The court, therefore, did right in rendering judgment for the plaintiff.

The denial in the defendant's amended answer, that the amount of stock, as required by law, had been duly subscribed before the time of the election of directors, is wholly immaterial and does not put in issue the fact intended by the pleader.

The plaintiff became a corporation as soon as the articles of association were filed in the Recorder's office. See section 33 of the act.

The cases cited by the counsel for the appellant from New York and Massachusetts, to show that a defendant may set up the defence, that a road company departed from the route mentioned in the charter, show that after the defendants had subscribed for stock, the charters were altered by the legislature without their consent, and in this are totally different from the case at bar.

GAMBLE, Judge, delivered the opinion of the court.

The judgment below having been rendered upon the petition and answer, upon the motion of the plaintiff, the only ques-

tion to be determined is, whether the original or amended answer sufficiently denied any material allegation of the petition, to require its proof by the plaintiff, or alleged any fact as a defence which would bar the plaintiff's right of recovery.

The act of the 27th of February, 1851, "allows persons to form themselves into a corporation for the purpose of constructing a plank road, by complying with the requirements of the act." In order to create the corporation, articles of association are to be signed, setting forth the "name which they assume, the beginning, termination and route of the road they purpose to construct, and its general plan; the amount of the capital stock of the company; the amount of each share; the names and residence of the subscribers; and the amount of stock taken by each; the term of years to which the existence of the association shall be limited, which shall not exceed thirty; and the number of directors proposed to be elected, which shall not be less than three nor more than nine." It is next provided that "whenever the stock subscribed amounts to one thousand dollars per mile of the proposed road, a copy of the articles of association, sworn to by at least two of the subscribers thereto, shall be filed in the office of the recorder of each county through which the road passes." The thirty-third section provides that "associations, framed under the provisions of the act, shall, from the filing of said articles with the recorder, be corporations known by the name they may assume in their articles of association."

The petition states the facts which, under this act, would constitute the association to which the defendant belonged, a corporation.

The defendant's original answer admits the existence of the facts which constituted the plaintiff a corporation, and alleged, by way of defence to the action, that the president and directors had located the road in such manner as very materially to depart from the route mentioned in the articles of association, and that such departure was without any necessity, but was made from an improper subserviency to the wishes of individ-

uals and against the interest of the company. Upon this ground of a change in the route of the road from that prescribed in the articles, the defendant claimed to be exonerated from all obligations to pay for his stock. The amendment to the answer retracts the admission that the plaintiff was, under the act, constituted a corporation, and denies "that the amount of stock, as required by law, had been duly subscribed before the election of the officers of the said supposed company." He also denies "that due notice of the time and place for holding the election of officers was given, as required by the law above referred to."

The three grounds of defence stated in the answer, naturally take this order: 1st, that the amount of stock required by law to be subscribed before the articles of association were filed in the Recorder's office, was not subscribed; 2d, that there was not legal notice given of the election of the officers, and, 3d, that the president and directors, after they were elected, had caused the road to be located on a route different from that proposed in the articles of association.

1. In regard to the first point, the allegation of the petition is, "that after there had been more than enough stock subscribed to amount to one thousand dollars per mile of the proposed road, a copy of the articles was filed," &c. The answer to this allegation, instead of specifically denying it, says "that the amount of stock, as required by law, had not been duly subscribed before the election of the officers of said alleged company."

But what is the effect of the fact here alleged, and how can it avail the defendant? The act of the general assembly provides a mode by which the subscribers for stock in a company, which proposes to make a plank road, may obtain the name and privileges of a corporation. When the act is complied with, and a copy of the articles of association filed in the recorder's office, the incorporation is complete. It is undoubtedly true, that a defendant, in an action commenced by such corporation, may put the plaintiff to the proof of the facts

which confer the corporate character ; but, in the present case, the question arises whether the defence, which is attempted to be made, can be allowed to this defendant. It is alleged, not only that the requisite amount of stock was subscribed, but that when the company was organized, under the charter, and officers elected, the defendant was present at the election and voted as a member of the company. In the *President, Managers & Co. of K. & C. Turnpike Co. v. McConaby*, 16 Serg. & R. 140, it was held, that when a corporation was created under an act which provided "that when six hundred shares had been subscribed, the commissioners should certify that fact to the Governor, who should thereupon, by the name of the president," &c., a subscriber for stock could not dispute the corporate character of the company, on the ground that three hundred of those six hundred shares had been subscribed fictitiously, when it appeared that the defendant, who was sued upon his subscription, had accepted the charter and acted upon it. In that case, it appeared that the defendant was one of the seven persons named in the charter, that he advertised the election of managers and voted by proxy. The same doctrine is maintained in the *Selma & T. R. R. Co. v. Tipton*, 5 Ala. 807, and Chief Justice Collier applies the law of estoppels *in pais*, to the defence thus attempted by the subscriber for stock, who has participated in the organization of the company and then denies its corporate character, because of a failure to comply with some of the requirements of the statute under which it claims being.

In the present case, as it stands admitted upon the record, that the defendant has assisted in the organization of this company, he will not be permitted to escape the duty he assumed when he subscribed for the stock, upon the ground that the company was not organized in strict conformity to the law.

2. The second ground of defence, that there was not legal notice given of the election of directors, is not entitled to consideration in this case. The insufficiency of the notice of the election has no effect to discharge the defendant from his promise to pay for his stock.

3. The third ground of defence is equally unavailing. If the directors of the company, in locating the road, have departed from the route proposed in the articles of association, so as in fact to make it a different enterprise from that in which the defendant engaged, and different from that which is authorized under the law, they have violated their duty to the company and to the law, but not more to the defendant than to every other member of the company. If their act stands as the act of the company, and is such a departure from the route proposed in the articles, as to be a different enterprise, then the whole corporate franchise may be taken from the company by the appropriate proceeding. But in the present suit for an instalment due upon the defendant's stock, this question cannot arise. The authorities cited from New York and Massachusetts, to show that an alteration in the charter of an incorporated company, made after the original subscription of the stock, materially changing the character and objects of the company, discharges a subscriber from his obligation to pay upon his original subscription, when he has refused to consent to any such alteration, do not apply to a case like the present. Let the judgment be affirmed.

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SOULARD, Respondent, *vs.* LANE, Appellant.

A. conveyed to B. real estate to be held in trust for A. until a certain sum was paid, and afterwards in trust for the separate use of the wife of C. At the same time, A. executed an agreement to complete improvements then in progress on the property, in a specified time and manner. *Held,*

1. Although C.'s wife assumed no personal obligation to pay the stipulated price, yet payment could be enforced against the property itself.
2. She is entitled to a deduction from this sum, to the extent of any loss sustained by a failure of A. to comply with his contract to complete the improvements.
3. The rule which would prevent A. from recovering any part of the price, unless he had strictly complied with his contract, is only applicable where a defendant is resisting a personal judgment, because of a failure of plaintiff to have work done according to a contract.



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Soulard v. Lane.

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*Appeal from St. Louis Circuit Court.*

This was a civil action, commenced by Soulard on the 3d of November, 1849, against Margaret B. Lane and others, to foreclose a deed of trust and to subject the trust property to the payment of the purchase money.

The petition stated that the plaintiff and his wife, on the 6th of April, 1846, in consideration of nine thousand dollars to be paid in four annual instalments, beginning October 15th, 1846, and bearing interest from that date, conveyed to the defendants, Clark, Churchill, Barret, Frémon and Reber, certain lots of ground in Soulard's Addition to the city of St. Louis, in trust for the following purposes: "That, whereas, the said lots had been purchased from said Soulard for the sole and separate use of the defendant, Margaret B. Lane, to be paid for out of her separate estate, in instalments as above set forth, and it was provided and stipulated in the said conveyance, that if there should be a failure to pay any of the instalments, when they became payable, or any interest thereon, the said trustees, Clark and others, or any one of them, might sell the lots at public auction, to the highest bidder, for cash, on twenty days' notice; and upon such sale should pay the plaintiff the said purchase money, and the residue of the proceeds of the sale, if any, was to be paid to the defendant, Mrs. Lane. The said conveyance was expressed to be made on the further trust that, if the plaintiff should be fully paid the purchase money, with interest, then the trustees should suffer Mrs. Lane to hold and enjoy the lots as she should think proper, should convey the same according to her direction, and should hold the same for the sole use of herself and her heirs."

The petition states that the whole of the purchase money and interest was due and unpaid; that the defendant, Mrs. Lane, is in possession of the lots, and has been in possession of the same, ever since the autumn of the year 1846; and prays that judgment may be rendered for the said debt, the

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equity of redemption be foreclosed, and the lots sold to satisfy the debt, interest and costs. A copy of the deed of plaintiff and wife was filed, as an exhibit, with the petition.

None of the defendants, except Mrs. Lane, answered. And she, by way of answer, admitted that she had purchased the lots described in the petition from plaintiff, and that they were conveyed at the time and in the manner alleged, but denied that she agreed to pay the sum of nine thousand dollars for them; and alleged that they were sold to her at twelve dollars per foot, and that she only agreed to give that sum, because she was in want of a house, and that there was then a house in progress of erection on the lots; that before the sale to her, the plaintiff had made arrangements to improve the ground for his own use, and for that purpose, had made his plans and had entered into contracts with architects, builders and others, for the completion of his improvements according to the plans, specifications, &c.; that before the sale, the plaintiff exhibited to her the house then in progress, and also all his contracts, plans and specifications, for the completion of the house and other improvements, &c., and offered to convey the ground to her and complete the house and improvements, as originally contemplated; and that she was to pay the said sum of nine thousand dollars for the ground, and the improvements then thereon and afterwards to be put thereon by the plaintiff. The answer further states, that on the 6th of April, 1846, the plaintiff entered into an article of agreement with said Clark, Churchill and Barret, whereby he bound himself to complete the house and other improvements in the manner originally intended, and according to the plans and specifications referred to in the article, at his own cost, by the 15th of October, 1846. The article of agreement and the plans and specifications therein referred to were all filed as exhibits, except specification No. 1, which was missing. By the article, Joseph Foster was superintendent of the work to be done. The answer proceeds to aver, that the plaintiff had not complied with his contract with her or her trustees in any particu-

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lar ; that neither the house nor the other improvements were completed by the 15th of October, 1846 ; that the house was not yet finished ; that such parts as are pretended to be complete, are not done according to contract ; that the materials are inferior and defective ; that the house and other improvements are grossly slighted, and are altogether inferior to those called for by the contract ; in short, that all the work and materials were inferior, defective, &c., &c. The answer says, that the defendant, Mrs. Lane, went into the house about the 15th of October, 1846, with the plaintiff's permission, and has been living there ever since, without objection on his part ; that when she bought the lots, she was a married woman ; and that some time in the year 1847, her husband, James S. Lane, fell out of one of the windows of the house, in consequence of its being unfinished, and was killed, and that if the plaintiff had completed and fulfilled his contract, her husband might still be alive : by reason of all which, she, the defendant, does not owe the plaintiff any thing, but claims ten thousand dollars damages.

Upon the trial, the plaintiff read the deed to the defendants and rested.

The defendant, Mrs. Lane, gave in evidence a contract, dated April 6th, but executed (apparently) April 13th, 1846, between the plaintiff and Clark, Churchill and Barret, as trustees of Mrs. Lane, in which the plaintiff, in consideration that Mrs. Lane had bought the lots and agreed to pay nine thousand dollars therefor, and that, at the time of the purchase, it had been agreed that the plaintiff should complete the house in progress, agreed to finish the house, &c., according to the plans and specifications referred to, by the 15th day of October, at his own cost. The defendant also gave in evidence specification No. 2, referred to in the contract, which designated how the plastering should be done ; also, the painting, the kind of window glass, the quality of paint, the quality of the hardware, locks, &c. ; that the front and southern windows of the second story should have iron railings, costing six dol-

lars; there should be steps in front and rear of the house; that a stable should be built on the lots similar to Ridgway's; that the northern half of the lots should be graded by the 15th of October, 1846, and the balance by the 1st of October, 1847. The kind of fencing was also designated in the said specification, leaving Mr. Lane his choice, whether the front fence should be a foot high or average a foot high, &c. The defendant, Mrs. Lane, then examined witnesses, whose testimony tended to show that the house was not completed by the 15th of October, 1846, and that the workmanship and materials were inferior to those required by the contract. It also appeared from the testimony on both sides, that James S. Lane, the husband of the defendant, Margaret B. Lane, acted as her agent in reference to the completion of the house and other improvements on the grounds.

The plaintiff then called witnesses, whose testimony tended strongly to show, that the house was completed and the other improvements made with the best materials, and in the best and most workmanlike manner, and that, although they were not all completed by the 15th of October, 1846, the delay arose, in great part, out of the conduct of Mrs. Lane, her husband and family; that Mrs. Lane, with her husband, children and servants, moved into the house some time in September, before it was to have been completed.

It further appeared from the plaintiff's evidence, that the house was up and under roof, and that the door and window frames were in, and that the gutters and conductors were up, when the plaintiff sold the ground to Mrs. Lane; that the plaintiff began to build the house for himself, and no expense nor pains were spared, to make it the most substantial kind of a building, and such it was, and that it had already cost plaintiff considerably over \$4000, when he sold the ground to the defendant. It also appeared, that the plaintiff had paid out more than \$5000 for completing the house and improvements, after he sold to Mrs. Lane. In other words, the improvements he put upon the ground, cost more than he was to get for both

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ground and improvements. The evidence being closed, the plaintiff asked the following instructions, which were given :

1. The plaintiff is entitled to recover in this action the amount set forth in the deed of trust sued on, with interest, as therein stated, deducting therefrom any damages, if the jury find from the evidence that the defendant is entitled to any, for any failure in completing the work according to contract ; but no damages can be allowed for any such failure as to the time of finishing, or as to the kind or quality of the work, if the defendant, Lane, or her agents, caused such failure.

2. That no deduction is to be allowed, on account of the death of James S. Lane, from the amount of plaintiff's demand.

3. That no allowance nor deduction from the plaintiff's mand is to be made by the jury, for any defects in the house or improvements, if the same were owing, and so far as the same were owing to the acts or instructions or agreement of the defendant, Lane, or her husband, or to the presence of the defendant's family and acceptance of said house and premises by them.

4. That the defendant, Lane, by moving into said house, with her family, and occupying it with the lot and other improvements thereon, and by thus holding it and using it, from before the time limited for its completion down to the present time, if the jury find such possession and occupation is precluded from now rescinding the contract.

5. That the taking possession of the house and property in question, and occupying and using it from September, 1846, by the defendant, Mrs. Lane, up to the present time, if such be the fact, put it out of her power to decline paying the plaintiff for said property ; and, in that view of the case, the amount to be paid and for which the plaintiff is entitled to have judgment, is the whole principal and interest of the sums stated in the deed of trust sued on, if the work has been completed according to the contract ; but if the work has not been done

according to the contract, then the jury will consider how much such default has diminished the value of the property to Mrs. Lane, and they will deduct such diminution from the amount called for by the deed, if such diminution is owing to the fault or neglect of the plaintiff or his agents or workmen ; but any defect in the work, or failure to do it, according to the contract, or diminution of value, arising from the orders or interference or acts of Mrs. Lane, or her agents or family, is not to be charged to the plaintiff nor deducted from the amount to be paid him.

The defendant excepted to the giving of the above instructions, and then asked the following, which were also given :

1. If the jury believe from the evidence, that Margaret B. Lane went into the house before the same was finished, and that, whilst the work was in progress, plaintiff was informed by her or the superintendent, that the work was not done according to contract and could not be received, the act of moving into the house was not such an acceptance of the work on the part of the defendant as to prevent her from showing that the same was of less value or inferior to what was contracted for. If the jury believe from the evidence, that Margaret B. Lane agreed to pay the plaintiff \$9000, for the property in question, upon condition that the plaintiff should complete and make the buildings and improvements contained in his contract, and in the manner therein stated, and that the plaintiff undertook and agreed to comply with said contract, but failed to do so, and such failure arose from the negligence or fault of the plaintiff, the measure of damages must be the sum agreed upon by the parties, minus the amount of money it would take to complete the buildings according to the contract.

2. The plaintiff is not entitled to a judgment in this case against the defendant, unless he prove that he has complied with the contract on his part, or was prevented from so doing by the defendant or her agents, or unless he prove that there was an acceptance of the work.



The defendant asked the following instructions, which were refused :

1. If the jury believe from the evidence, that the plaintiff has not complied with his contract entered into on the 13th day of April, 1846, for the completion of the buildings therein named, they will find for the defendant.

2. If the jury believe from the evidence, that the defendant, Margaret B. Lane, agreed to pay \$9000 for the ground named in the plaintiff's petition, provided the plaintiff would complete certain buildings named in the article of agreement, according to the plans and specifications therein referred to, and in the time therein stated, the plaintiff cannot recover, unless he has complied with his agreement (and it is incumbent on the plaintiff to show a compliance on his part,) or unless the work has been accepted by the defendant.

3. If the jury believe from the evidence, that Margaret B. Lane was, at the time the contract was made for the purchase of the ground and buildings of the plaintiff, a married woman, they will find for the defendant.

4. If the jury are satisfied from the testimony, that Margaret B. Lane was a married woman on the 13th day of April, 1846, and find no evidence showing that she possessed separate property at that time, they will find for the defendant.

5. If the jury believe from the evidence, that the plaintiff sold the ground in question, and agreed to erect thereon certain buildings according to specifications, and to complete the same by a certain time for \$9000 ; that he failed to comply with his contract, either in the time or in the manner in which the work was to be completed, they will find for the defendant, unless they believe there was an acceptance by the defendant.

6. If the jury believe from the evidence, that the plaintiff entered into a contract, binding himself to complete and make certain buildings and improvements therein set out, and in a manner and by a time therein stated, and that he has failed to comply with said contract, in any particular, they will find for

the defendant, unless they believe from the evidence, that he was prevented by the defendant.

7. The deed executed by the plaintiff and wife, conveying lots of ground in Soulard's Addition, to Samuel Reber, DuBouffay Frémon, J. Richard Barret, Samuel Churchill and M. Lewis Clark, is no evidence of any indebtedness on the part of the defendant, Margaret B. Lane.

8. If the jury believe that James S. Lane was the husband of Margaret B. Lane, and that he lost his life in consequence of the failure of the plaintiff to comply with his contract, the defendant is entitled to damages occasioned by the loss of her husband, if the jury believe from the evidence, that any damages were thereby sustained.

9. The defendant is entitled to the benefit of the rise in the value of the lots since the contract of purchase was made; and in arriving at the value of the whole property, the ground must be estimated at the price agreed upon, or at its value at the time the purchase was made.

10. If the jury find from the evidence, that Margaret B. Lane never entered into any written contract for the purchase of the lots of the plaintiff, they will find for the defendant.

11. If the jury believe from the evidence, that Margaret B. Lane was, at the time the contract of purchase was made, a *feme covert*, they will find for the defendant, unless they believe from the evidence that her husband was a party to said contract and executed the same with her.

12. The contract, existing between the plaintiff and the trustees of Margaret B. Lane, cannot be changed or varied by any act of James S. Lane, or by any parol agreement between plaintiff and defendant, Margaret B. Lane.

13. The contract, existing between the plaintiff and defendant, is in no wise affected by any act of James S. Lane, unless it is proved that he was her agent; and any thing said by James S. Lane is not competent evidence in this case.

14. If the jury believe from the evidence, that the plaintiff has not complied with his contract, they will find for the defen-

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dant, unless it is proved by the testimony, that he was prevented from a compliance with his contract by the act of the defendant or her agents.

15. It is incumbent on the plaintiff to prove that he has complied with his contract, unless he shows that he was prevented from doing so by the defendant or her agents.

16. If the jury believe from the evidence, that the plaintiff agreed to make and complete certain improvements and buildings on the lots named in the petition, before the amount or any part of the amount agreed on should be paid for the same, and that the plaintiff failed to comply with the covenants in said agreement, they will find for the defendant, unless they believe from the evidence, that he was prevented from compliance by the act of the defendant or her agents.

The defendant took no exception to the refusal of the court to give the above instructions. The cause being submitted to the jury, they found for the plaintiff the amount claimed, less the sum of \$616 66; and the defendant, Margaret B. Lane, filed her motion for a new trial, which being overruled, she brings the cause to this court by appeal.

*J. R. Barret*, for appellant. 1. The written contract under seal, between Soulard and the trustees of Mrs. Lane, could not be varied or affected by parol instructions or agreements of her or her trustees. The court, therefore, erred in giving the third and fifth instructions asked by the plaintiff below. 2. Soulard, not having complied with the special agreement, either in time or manner, ought not to recover. 4 Mo. Rep. 481, *Helm v. Wilson*. Ib. 514, *Feagan v. Meredith*. 3. There being an express contract not rescinded or executed, no recovery could be had on a *quantum meruit*. Chitty on Con. 565. 8 Carr. & Payne, 126. *Stollings v. Sappington*, 8 Mo. Rep. 118. *Chambers v. King*, ib. 517. Selw. N. P. 71 (7 ed.) Bull. N. P. 139. 1 Wils. 117. *Hulle v. Heightman*, 2 East. 145. 4. The contract being entire, the party failing to perform is entitled to no remuneration. Chit. on Con. 570. 9 B. & C. 92, *Sinclair v. Bowles*. A sub-

stantial compliance not sufficient. 17 Maine, 316, *Hill v. School District*. 2 Fairfield, 346, *Jewett v. Weston*. 3 Penn. Rep. 445, *Shaw v. Turnpike*. 5. The deed to the trustees was never executed by Mrs. Lane or her husband. She, being a *feme covert*, was incapable of contracting, unless she had separate property—then, merely as to the separate estate. Roper on Husb. and Wife, 242-3, 30 Law Lib. 7 Paige, 9. A *feme covert* acts, with regard to her separate property, in all respects as a *feme sole*, but can she be regarded as a *feme sole* in contracting for the acquisition of separate property? Separate property of a *feme covert* may be charged with an indebtedness evidenced by a written instrument, but not by a parol promise. 2 Bright on Husb. and Wife, 517. 1 Madd. Ch. 469. 2 Atk. 379, *Clark v. Miller*. 6. An implied *assumpsit* cannot be raised against a *feme covert*. Batten on Contracts, 33 and authorities cited. Therefore, an acceptance of the deed of trust or taking possession of the property by Mrs. Lane, whilst under coverture, cannot bind her to the contract of purchase. 7. To decree a foreclosure in this case would be tantamount to granting a specific performance of the contract, which a party who has failed to perform has no right to ask. 2 Wheat. 290, 299, *Morgan's Heirs v. Morgan*. 3 Cow. 445, 505, *Seymour v. Delany*. 9 Yerg. 283, *Rew v. Noe, et al.* 3 Bibb, 52, *Turner v. Clay*. 1 Bibb, 590, *Greenup v. Strong*. 4 Pet. 311, *King v. Hamilton*. 2 Wheat. 336, *Colson v. Thompson*. 9 Cranch, 456, *Pratt v. Law*. 9 B. & C. 92, *Sinclair v. Bowles*. 3 Carr. & P. 144, *Parmeter v. Burrell*. 8. Soulard, having failed to make the improvements in the manner and by the time agreed on, cannot recover, because courts will not relieve against a broken condition precedent. *Crocker v. Goodsell*, 1 Scamm. R. 107. *Chouteau v. Russell*, 4 Mo. Rep. 553. 9. It is admitted that Mrs. Lane is not personally liable for the debt found by the jury, yet the amount of damages, assessed to her, has been deducted from the amount of the claim against the property. This

ought not to have been done. 10. The taking possession of the property was not an acceptance of the work, because defendants had a right to enter, immediately after Soulard executed the deed.

*Spalding & Shepley*, for respondent. 1. The first instruction was fully as favorable to the defendant as the law would allow. The suit was to subject the land to sale for the debt and not for a judgment against Mrs. Lane. This instruction allows the jury to deduct, by way of *recoupment*, any damages sustained by a failure to complete the work according to contract, if such failure was not caused by Mrs. Lane or her agents. *Sickles v. Fort*, 15 Wend. 559. In 8 Mees. & Wels. 871, 872, it was held that a defendant might show how much less the subject matter of action was worth, by reason of the breach of contract, but could not show damages for subsequent necessity of repairs. Where completion of work has been delayed or prevented by the plaintiff, he cannot recover damages. 3 Mees. & Wels. 389-90. Speculative damages cannot be recovered. 12 Mo. Rep. 313. Though the work be not done according to contract, yet, if the party accepts it, he is liable to pay its value. 7 Mo. Rep. 530. 2. The second instruction given for plaintiff was correct. Brown on actions at Law, p. 106-7, 43 vol. Law Lib. 3. The third instruction given for plaintiff was correct and supported by the evidence. It was shown that the husband of Mrs. Lane was her agent. It was also shown that she moved into the house long before the time fixed in the contract for its completion, and thus, with her family, injured, defaced and soiled the work and greatly delayed it. 4. The fourth instruction given for plaintiff asserts correct law. 7 Mo. Rep. 530. 3 Watts, 531. 5. The fifth instruction given for plaintiff contains a summary of the law applicable to the case. 6. The instructions asked by defendant and refused, so far as they were correct and applicable, were covered by the instructions given for plaintiff. Mrs. Lane, in her answer, did not set up her *coverture* at the time of the sale and contract, as a defence

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Besides, her remaining in the house since she became a widow, up to this time, is a ratification of the contract, if it needed any. The plaintiff did not claim a judgment against her individually.

*Frémon & Reber*, for same. 1. Though Mrs. Lane is not liable personally, her estate is. The contract of a married woman, though void at law, is binding in equity. In equity, a married woman is considered a *feme sole*. 2 Story's Eq. 597. She may acquire separate property; ib. 606; and may dispose of it; ib. 614; and may charge it with her debts; ib. 627. *Dyett v. N. A. Coal Co.* 20 Wend. 570. *Murray v. Barlee*, 3 Mylne & Keene, 209, (9 Cond. Eng. Ch. R. 1.) A contract even between husband and wife, through the medium of trustees, is valid. 2 Story's Eq. 652. Clancy on Rights, 405. 14 Ohio Rep. 257. 2 Roper on Husband and Wife, 272. And she may acquire property from her husband. 2 Kent, 166. Much more from a stranger. It is expressly stipulated in the deed that the property should be liable and the trustees are authorized to sell, in case Mrs. Lane made default in the payments. 2. The completion of the improvements is not a condition precedent to the payment of the purchase money, as appellant supposes, but is a collateral matter, not going to the essence of the contract of sale. The law of the case is, that the purchaser shall pay the purchase money agreed upon, deducting whatever damages the defendant may have suffered, by reason of the plaintiff's failure to complete the improvements according to his agreement; but that, so far as the defendant and her agents caused such failure, she is not entitled to any deduction. The evidence shows that the contract was substantially fulfilled, and that the appellant accepted the work and retained possession of the property. She is, therefore, bound to pay the whole contract price, deducting the damages, as above stated. 2 Phill. on Ev. 108-9. 2 Greenl. Ev. 80. 7 Mo. Rep. 530. 7 Pick. 181. 8 ib. 178. 4 Cow. 564. 25 Wend. 665. 4 Taunt. 748. 3 Fairfield, 293. *Cutler v. Close*, 5 Carr. & Payne, 337 (24 E. C. L. R.)



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*Ligget v. Smith*, 3 Watts, 331. Addison on Contracts, 197 *et seq.* 12 Mo. Rep. 313. As to the measure of damages when the contract is not strictly completed, see 7 Pick. 181. 12 Verm. 625. Even on a building contract, the builder may recover, when the failure does not go to the essence of the contract. Addison on Contracts, 197. 1 Hen. Black. note, p. 273. *Franklin v. Miller*, 4 Ad. & Ellis, 599. 25 Wend. 665. A contract may be waived or modified by parol. 4 Cow. 564. 9 Pick. 298.

GAMBLE, Judge, delivered the opinion of the court.

1. The judgment sought by the plaintiff, and actually given by the court, is a judgment subjecting the property to sale to pay the purchase money. Mrs. Lane, being a married woman at the time the plaintiff conveyed the property to the trustees for her benefit, assumed no personal obligation to pay the stipulated price, but the property itself stood as the only security to the plaintiff for its payment. The trustees held for his benefit until the money was paid, and were bound to enforce the payment by a sale, upon failure to pay. If the debt was satisfied, they were then to hold for Mrs. Lane's separate use. The whole interest acquired by Mrs. L., under this conveyance, was the right to the property, subject to the payment of the agreed price.

2. As the plaintiff bound himself to complete the improvements, then in progress upon the property, according to certain specifications and in a given time, any failure on his part to comply with his agreement, either in the quality of the materials, the character of the workmanship, or conformity to the plan, diminished the value of the premises to Mrs. Lane, and entitled her to ask that a deduction, equal to the loss thus sustained, should be made from the amount secured to the plaintiff in the conveyance, as the price of the property. To the extent that the sum to be raised by a sale of the property shall be reduced by this deduction, on account of the plaintiff's failure to comply with his agreement, will Mrs. L. be compensated for his default. To illustrate this, if the jury had regarded the

value of the improvements, in the manner in which they were completed, as \$3000 less than their value if completed according to the plaintiff's agreement, then that sum was to be taken from the stipulated price, and Mrs. Lane would free the property from the plaintiff's incumbrance by the payment of that much less of the purchase money.

3. Considering the character of the case, and the relief prayed for in the petition and given by the court, the instructions given to the jury were altogether as favorable as the defendant could have hoped for. The last instruction, given at the request of the defendant, was altogether too strong in her favor. The plaintiff was seeking no judgment to bind her personally, but a mere enforcement of the trust contained in the conveyance, and yet this instruction would have debarred the plaintiff from having any payment of any part of the purchase money, if a failure was shown in complying with the agreement in any material particular, unless he proved that Mrs. Lane had prevented a compliance with the agreement, or had accepted the work. In such a case, the proper rule is, to reduce the amount to be satisfied out of the property, to the extent of the plaintiff's failure, and let him have satisfaction of such reduced sum. The instruction, as given, was only applicable to a case where a defendant was resisting a personal judgment, because of the plaintiff's failure to have work done according to a contract.

The fifth instruction, given at the request of the plaintiff, was a proper statement of the law applicable to the case. The judgment is, with the concurrence of the other Judges, affirmed.

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STATE OF MISSOURI, Respondent, *vs.* FAWCETT, Appellant.

1. When a person, who has entered into a recognizance to keep the peace and to appear before the Criminal Court, shall there be discharged, by reason of the failure of the prosecutor to appear, it is error for the court to adjudge the costs against the defendant. They should be adjudged against the prosecutor.

*Appeal from St. Louis Criminal Court.*

*Blennerhassett & Shreve*, for appellant.

I. The appellant insists that he was entitled to his discharge upon the statement of the case. See Rev. Stat. page 856, sections 9, 10 and 11. That when the statute so provides, any condition attached is a violation of the discharge.

II. That the court has no power to impose costs, except in the cases contemplated in the eleventh section, *i. e.*, where both parties are in court, but there is no complaint.

*Lackland*, for State.

Defendant was discharged under the provisions of the tenth section of first article of act regulating practice and proceedings in criminal cases, page 856. It is contended by the state that there is a discretionary power in the Criminal Court to adjudge the defendant to pay the costs. He was the party in fault, which must be taken as conclusively proven by the proceedings before the justice. If it had not been so, the justice would not have bound him over.

RYLAND, Judge, delivered the opinion of the court.

Fawcett had been required to enter into a recognizance before a justice of the peace, for his appearance before the Criminal Court, and, in the mean time, to keep the peace until his appearance at that court. On the first day of the term of the court, Fawcett appeared, but the person, on whose affidavit he was arrested before the justice of the peace, neglected to appear. The Criminal Court discharged Fawcett, but adjudged the costs of the prosecution to be paid by him. To this he excepted, and brings the case before this court.

1. The error relied upon, for reversing the case, is, the judgment of the Criminal Court for costs, against Fawcett. The statute "Practice and Proceedings in Criminal Cases," article one, section ten, declares, that "when any person shall have been bound to keep the peace, on the complaint of another, and the complainant shall not appear, the party recognized shall be discharged, unless good cause to the contrary be shown."

"Sec. 11. Upon the appearance of the respective parties, and in cases where there is no complaint, the court shall examine the evidence, and may either discharge the recognizance taken or require a new recognizance, as the circumstances of the case may require, for such time as shall appear necessary, not exceeding one year; and in such cases, costs shall be adjudged according to the discretion of the court."

In this case, the complaining party did not appear. Does the discretionary power in section eleven, extend to this case? We are inclined to the opinion, that in such cases, where the party recognized is discharged, because the party complaining fails to appear, the costs should be adjudged against the party who fails to prosecute, and not against the party discharged. This was the practice generally, in the circuits over which two of the Judges once presided. It is the best practice, and when it becomes known, the parties are aware of the consequences of a failure to prosecute.

Under the eleventh section, the court may award the costs against the prosecutor upon the hearing; and I should think it has such power, when the failure to bring the accused to a hearing is owing to the prosecutor. He makes the complaint: he ceases to prosecute the complaint. Let him be responsible for costs, when he makes a groundless charge.

In our opinion, therefore, the costs should have been adjudged against the prosecutor and not against the person who was discharged.

The other Judges concurring, the judgment below is reversed.

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STATE OF MISSOURI, Respondent, *vs.* FREDERICKS, Appellant.

1. Under the act concerning groceries and dram shops, a license to sell intoxicating liquors at one place is no defence to an indictment for selling them at a different place, although the two bars are in adjoining buildings and there is a communication between them.

*Appeal from St. Louis Criminal Court.*

*J. R. Lackland*, circuit attorney, for State.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted for selling intoxicating drinks without license. He was found guilty, and his fine assessed at twenty dollars in each case. There being two indictments found against him at two different terms of the Criminal Court, by consent, one jury tried both cases at one time. The defendant offered his license, authorizing and permitting him to sell at his stand on Green and Front street, but no other place. The proof conduced to show that he had a house on the corner of Green and Front streets, called the "Alabama House," which was a stone building, and a house called the "Gem," a brick building. The Gem was situated at the corner of Green street and Commercial alley: the Alabama House on the northwest corner of Front and Green streets. He sold intoxicating liquors at both places, and had but one license. The question was, whether these two places were one and the same stand, or were different. If one, the defendant's license covered the offence and he was not guilty. If two, he was guilty. Much evidence was given on this question. The court instructed the jury, that "unless they believe from the evidence, that the bar-room called the Gem House, and the one called the Alabama House are one and the same place, they must find the defendant guilty. If the house, in which the Gem bar is kept, is distinct from the one in which the Alabama house is kept, and the one house is not necessary to the use of the other, then they cannot be considered one and the same place, and they ought to find the defendant guilty, although the jury may believe that there was an internal communication from one to the other."

The court refused to instruct the jury "that if they believe that defendant sold, as charged in the indictment, at the same place, they will acquit, although he may have kept more than one counter, where liquor, &c., was sold." The defendant excepted to the giving and refusal of instructions.

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State v. Felps.

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After conviction, he moved for a new trial, which being overruled, he brings the cases here by appeal. There was no dispute about the sale of intoxicating liquors. The only point was, whether they were sold at one or two places, and therefore the instructions were worded in regard to this point only. Whether there was but one or two places, was a matter of fact for the finding of the jury, under proper instructions. They found there were two places, and I think very correctly. The instructions given properly put the question in issue before them, and the one refused was not calculated to aid or assist them in arriving at a more correct conclusion. From the evidence, it seems that the defendant himself, until he became a little more desirous of saving, and a little less scrupulous in paying for license, considered these places as two establishments, and took out two licenses, one for the "Alabama" and another for the "Gem" stand. The jury having found the defendant guilty, under proper instructions, let him abide the consequences of his failure to take out two licenses, as he at first did.

The other Judges concurring, the judgment of the Criminal Court is affirmed.

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STATE OF MISSOURI, Appellant, *vs.* JAMES A. FELPS,  
Respondent.

1. The Supreme Court will presume that the court below decided correctly, unless the record shows the contrary.

*Appeal from St. Louis Criminal Court.*

*M. N. McLean*, for State.

*E. W. Shands*, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The record of the proceedings in this case does not present such facts as this court can adjudicate upon. There is noth-



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ing but the rule against the said Felps, as marshal of the city, the conviction of Harris and execution against him for costs, and the answer of Felps, stating that he appropriated so much of the money taken by him from Harris, when he arrested him, to payment of the costs in the Recorder's Court, which had accrued against the defendant, Harris, and the balance to the marshal of St. Louis county. It does not appear that there were any exceptions to the answer of Felps, nor whether the costs in the Recorder's Court accrued on the prosecution of the defendant for the same charge or offence for which he was afterwards convicted in the Criminal Court. We must conclude that the court below decided correctly, unless we can see the contrary from the record before us. There is nothing preserved here, calling for the interposition of this court.

The judgment below is, with the concurrence of the other Judges, affirmed.

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STATE OF MISSOURI, Respondent, vs. CLUMP, Appellant.

1. A party who has been jointly indicted with the defendant, but in whose case a *nolle prosequi* has been entered, is a competent witness against him.
2. The Supreme Court will not reverse either a criminal or civil case, for the refusal of the court below to instruct the jury that evidence of verbal confessions is to be received with great caution.

*Appeal from St. Louis Criminal Court.*

*F. Spies*, for appellant.

I. The state could not introduce the statements of co-defendant, Schroeder, not under oath, as those of an accomplice, and afterwards make a witness of said co-defendant.

II. In larceny, there must be a *taking*, and although the taking may be presumed from the *possession*, yet no possession was proved against the defendant Clump.

III. Although possession may be *constructive*, yet a constructive possession upon a presumed taking cannot amount to

more than a *presumptive larceny*, a thing not recognized in law, because all doubts must be in defendant's favor.

IV. The *verbal extrajudicial confessions* of a defendant of his guilt should be received with great caution, and the court erred in refusing such an instruction asked for by the defendant to the jury. 1 Greenl. Ev. sec. 200, p. 241. *Ib.* sec. 214, p. 256.

*J. R. Lackland*, circuit attorney, for State.

The first error complained of is, that the court permitted the state to enter a *not. pros.* as to Schroeder, and introduce him as a witness against the defendant. It is deemed useless to refer this court to authority, to show the action of the court in this behalf correct. The evidence in this cause supports the verdict. The jury thought it sufficient to exclude any rational doubt, and this court will not disturb the verdict. We perceive no errors in the instructions given. The first and second instructions cannot be questioned. The third instruction given is good. The three instructions refused were properly refused; they were all bad.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted for grand larceny, (hog stealing,) by the grand jury of St. Louis county—was tried and convicted. He moved for a new trial. The motion was overruled, and he appealed to this court. The bill of exceptions preserved the evidence and the instructions given on the trial. In the opinion of this court, the instructions given properly put the case before the jury.

1. The admission of the witness Schroeder, who was jointly indicted with the defendant, but in whose case a *nolle prosequi* had been entered by the state, was not improper. The instructions given are, *first*: "If the jury believe from the evidence in the cause, that the defendant, in St. Louis county, and within three years before the finding of this indictment, did steal, take, and carry away any one or more of the hogs charged in the indictment, and the property of Hermann Steins, of any value whatever, and that he did so steal, for the

purpose of converting the same to his own use, you will find him guilty of grand larceny, and assess the punishment at imprisonment in the penitentiary for a term not less than two nor more than five years.

"If you entertain a reasonable doubt as to the defendant's guilt, you ought to acquit.

"Possession in law is divided into two kinds, actual and constructive. If the jury find from the evidence that the defendant Clump exercised any acts of ownership or control over the hogs mentioned in the indictment, or had the same upon his farm, that is possession in the eye of the law."

To these instructions the defendant excepted. He then asked the court to instruct the jury :

"If they believe from the evidence that the defendant Clump had no agency in taking possession of the hogs, but that he merely attempted to screen the guilty party by telling a lie, he cannot be convicted of larceny."

This the court gave to the jury. He also further asked the court to instruct the jury :

"That in order to convict the defendant of larceny, the taking and carrying away of them, or sufficient facts to raise a strong presumption of the same, must be proved.

"That the jury must receive the evidence concerning the verbal confessions of the defendant with great caution.

"That the jury will disregard the testimony of Schroeder.

"Any doubt as to the guilt of the defendant must be resolved in his favor."

These last the court refused to give, and the defendant excepted.

2. The Criminal Court had given instructions embracing the law of the case to the jury. These last were properly refused. Schroeder was a competent witness. The subject of doubt had already been brought before them. They had already been informed what constituted larceny; and the doctrine or mere legal rule of receiving evidence of verbal confessions with great caution, was the enunciation of an abstraction, not cal-

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State v. Jones.

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culated to assist the jury in finding their verdict, or supposing it might have that tendency, this court will not reverse for refusing said instruction in criminal or civil cases.

Upon the whole case, this court perceives nothing requiring it to send it back for further trial.

The other Judges concurring, the judgment below is affirmed.

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STATE OF MISSOURI, Respondent, *vs.* JONES, Appellant.

1. State v. Roberts, *alias* Ward, affirmed.

*Appeal from the St. Louis Criminal Court.*

*McLean & Mauro*, for appellant.

*J. R. Lackland*, circuit attorney, for State.

RYLAND, Judge. This case is similar to the one decided at the last term of this court, *State v. Roberts, alias Ward*.

The case of Roberts, when first before this court, was reversed and remanded. So likewise was the case of the *State v. Jones*. Roberts was tried anew, and convicted of murder in the first degree. On appeal to this court, the judgment was affirmed. Jones, the present defendant, was also tried and convicted of murder in the first degree. He was found guilty, as principal in the second degree, of murder in the first degree.

With the exception of the point of the admissibility as a witness of an accomplice and co-indictee, this present case presents generally the same points as were passed upon in Roberts' case.

The judgment of the court below is affirmed, and it is ordered that the Criminal Court do proceed to have the judgment carried into execution. The other Judges concur.

STATE OF MISSOURI, Respondent, *vs.* ADAM LEMP,  
Appellant.

1. Under the amendatory act of 1851, every fermented drink is an intoxicating drink, within the meaning of the act to regulate groceries and dram shops, approved March 25th, 1845.
2. No person can sell intoxicating liquor without a license, even though it is of domestic manufacture.

*Appeal from St. Louis Criminal Court.*

*Lackland*, for State.

The court did not err in sustaining the demurrer to the special plea of defendant. There is no provision in the law for the encouragement of home or domestic manufactures of this character, as assumed in the plea. The sale of intoxicating drinks is a matter of police regulation, and it is deemed useless to refer this court to authorities, to prove that the state has the power to license, tax, and suppress the sale of such commodities.

The first instruction given is correct. There is no exception in the law in favor of the manufacturer of intoxicating drinks. There was no error committed in giving the second instruction. The third section of the act to amend "an act to regulate groceries and dram shops, approved March 25th, 1845," (Session acts of 1851, page 216,) provides that "all fermented drinks and wines of every kind, shall be considered intoxicating, under the provisions of this act and the act to which this is amendatory." It is clear that the manner in which the drink is made, *i. e.*, by fermentation, settles the question whether it is intoxicating, without regard to the actual effect of the drink when taken. And so the second instruction declares the law to be.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted for selling without license, ale, beer, porter, rum, gin, brandy, whisky and wine in small quantities, one gill and one glass of each, in St. Louis county.

He appeared, and filed his special plea that he sold beer and ale only, and not the other liquors, and that the beer and ale were made by him in the city and county of St. Louis, within the state of Missouri, and not elsewhere. The state demurred to this plea. The Criminal Court sustained the demurrer, and required the defendant to answer over. He then plead not guilty. There was an issue on this plea, and verdict for the state. A motion for new trial was overruled, and an appeal taken to the Supreme Court.

The bill of exceptions shows that the defendant sold beer within the time mentioned in the indictment; that he keeps a beer house in the city of St. Louis; that he sold beer by the glass, and received pay for it, and that beer is a fermented liquor.

A witness stated, that he had been in Lemp's house and bought beer within the time charged; that beer is a fermented liquor; that beer is manufactured in Missouri; that hops, of which it is made, are raised in Missouri, as well as elsewhere; but he did not know where Lemp's beer was manufactured, nor where the hops and barley grew of which it was made.

The court instructed the jury, "that if they believed the defendant Lemp sold beer, as charged in the indictment, at St. Louis county, and within one year next before the finding of the indictment in this case, and that beer is a fermented drink, they will find the defendant guilty, and assess a fine against him of not less than twenty nor more than one hundred dollars, and in such case, it makes no difference whether Lemp manufactured the beer sold or not. If the jury believe that Lemp sold a fermented drink called beer, all such fermented drinks are declared by statute to be intoxicating, and the jury are bound so to regard them, and it makes no difference whether such fermented drinks are in point of fact intoxicating or not."

The court refused to instruct the jury, "that, if they believed from the evidence that the beer proved to have been sold was the growth, produce or manufacture of the state, they



must acquit the defendant. That the growth, produce or manufacture of this state are exempt from taxation, and if the jury find that the article charged in the indictment to have been sold by defendant was such, they ought to acquit."

1. The third section of the act to amend "an act to regulate groceries and dram shops, approved March 25th, 1845," approved March 1st, 1851, declares, "all fermented drinks and wines of every kind shall be considered intoxicating," under the provisions of this act, and the act to which this is amendatory. The drink mentioned in the evidence in this case is said to be fermented drink—beer is a fermented liquor, and, therefore, by force of the statute, an intoxicating liquor or drink, and the vendor must get a license before he can sell by the gill or glass.

2. The instructions given were proper, and those refused, were properly refused. We shall not spend a line on the point about its being of domestic manufacture.

The other Judges concurring, the judgment of the Criminal Court is affirmed.

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STATE OF MISSOURI, Respondent, *vs.* CRUISE, Appellant.

1. The Supreme Court will not disturb the finding of facts by a jury in a criminal case, unless manifest injustice and wrong have been done; nor will it control the discretion of the court below, in granting new trials, unless in cases strong and unequivocal.

*Appeal from St. Louis Criminal Court.*

*Blennerhassett & Shreve*, for appellant, contend that the evidence in this case does not sustain the indictment, and that the verdict of the jury is erroneous, even if the instructions were proper. There was no proof of violence or intimidation, one of which must exist to constitute the offence, in either of its three degrees known to the statute. Rev. Stat. sec. 25, p. 358. There is no material difference between the elements of the offence at common law and as defined in the 25th sec.

of our statute, p. 358. See Archbold's Crim. Plead. 224, 227. 2 East. P. C. 702. Ib. 103. 1 Hale, 534. Chitty's Cr. Law, 111, 840 & 5. The instructions are erroneous.

*Lackland*, circuit attorney, for State.

It does not appear from the record that any instructions were asked or given. The question whether defendant was guilty of the crime charged is one purely of fact, and the jury have found the fact against the defendant, and the evidence is sufficient to support the charge. It is the settled law of this court, that the verdict of a jury will not be disturbed if there be any testimony to support it.

Authorities cited: *Commonwealth v. Snelling*, 4 Binn. 379. *Kerley v. State*, 3 Humph. 289, see p. 304. 3 Gratt. 594, p. 611. Hill's case, 2 Grat. p. 602. *Roberts v. State*, 3 Kelly, 322-3. *Meyers v. State*, 2 English's Rep. 174. 4 Pike, 87, *Waller v. State*.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted in the St. Louis Criminal Court for robbery. He was convicted, and sentenced to ten years' imprisonment in the state penitentiary. He moved for a new trial, which being refused, he excepted, and brings the case here by appeal. It seems from the record that the evidence is saved by the bill of exceptions; but no instructions appear on the record, either as given or refused. No point of law appears by the record to have been raised in the court below. The evidence was left to the jury, and without any declaration of law from the court, by either party, they found the guilt of the defendant.

This is not such a case as justifies the court in interfering with the finding and judgment of the court and jury below. We have looked into the indictment, and finding that sufficient, the judgment below will not be disturbed. The presumption is in favor of the verdict. Unless the record affirmatively overthrows this presumption, we cannot disturb it, and it must do this in such a manner as to show that manifest injustice and wrong have been done the prisoner. 4 Pike, 89.

In the case of *Roberts v. State of Georgia*, 3 Kelly, 322, speaking of new trials, the court said: "The second ground, (that is, of the motion for new trial) admits that there was some evidence against the prisoner, but asserts that the weight of it was in his favor. Whether this was so or not, was a question for the jury to determine; their verdict negatived the idea that it was. It is their duty to weigh the evidence, reconcile it when conflicting, and to judge of the credibility of witnesses. Not only so, but it is the right of the parties that they shall discharge their duty. Applications for new trials are left to the discretion of the court; and the court will not, but in a case of manifest injustice, disturb the verdict of a jury. And when the court has exercised its discretion, and refused a new trial, this court will not interfere and control that discretion, but in cases that are strong and unequivocal."

In *McWhirt's* case, decided by the General Court of Virginia, in 1846, 3d Grattan's Rep. 611, that court observes: "Moreover, the jury who convicted the prisoner were the proper tribunal to weigh the facts and circumstances, as well as the testimony in the case; and in conformity with the principles in regard to granting new trials, settled in *McClure's* case, 2 Rob. Rep. 771, and *Hill's* case, 2 Grattan, 232, the court cannot, even if this court had differed from the finding of the jury, undertake to set aside the verdict because the jury decided against the evidence, or without evidence."

We think the language of these courts, as above quoted, so far as regards the granting of new trials by the lower courts, too strong. New trials are always addressed to the discretion of the courts in which the trials are had at first, and we hesitate not in saying, that the exercise of such discretion, in cases of doubt and uncertainty, may very much tend to the protection of the innocent, and greatly promote a proper and safe administration of the criminal law.

But we agree in the views entertained by these courts, so far as regards the duty of appellate courts. We will not interfere with the finding of the facts, unless manifest injustice

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and wrong have been done. Nor will we control the discretion of the lower courts, but in cases "strong and unequivocal." We think the lower courts should be liberal in exercising their discretionary powers on this subject in cases of doubt and uncertainty. This court must rely much upon their discretion,

Upon the whole of this case, then, the opinion of this court is, that the judgment of the court below be affirmed. The other Judges concurring, the judgment is affirmed.

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STATE OF MISSOURI, Respondent, *vs.* WILLIAMSON, Appellant.

1. A. was indicted for an assault upon B. with intent to kill. A. had previously written an obscene letter about his own wife, the mother-in-law of B., out of which the affray originated, in which A. was first attacked. *Held*, this letter was inadmissible as evidence against A.
2. On a charge of assault with intent to kill, an instruction, which so defines the crime as to exclude all consideration whether the assault was committed under circumstances of provocation, or in self defence, is erroneous.

*Appeal from St. Louis Criminal Court.*

*Blennerhassett & Shreve*, for appellant.

1. The appellant insists that the court below erroneously admitted a letter, purporting to have been written by the defendant to a third person, in evidence before the jury. This letter formed no part of the case, and nothing in it was material to the trial of the defendant. It was calculated to prejudice the jury against the defendant, and was considered so revolting in its terms and character, that the jury retired to read it.

2. The first instruction given for the State by the court is erroneous. By the very language of this instruction, all defence is taken from the consideration of the jury, and they are authorized to find defendant guilty, if he shot with intent to kill, even though the witness, Dorsheimer, were attempting to take the life of the defendant, when the latter shot.

The last instruction asked by defendant, and refused, ought

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State v. Williamson.

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to have been given. The court erred in refusing a new trial, upon the facts in this case and the law. The entire evidence shows a case of self-defence, and the party was convicted under excitement, the result of the admission of scandalous and irrelevant matter.

*Lackland, for State.*

The court did not err in admitting the letter in evidence. It was competent to show the position of the witness, Dorsheimer, to explain the reason why Dorsheimer went to the door to speak to defendant, and why Dorsheimer should tell him it was necessary for him to seek other lodgings.

The letter is shown to the defendant at the door, when and where a conversation is had concerning its contents. The difficulty originated in regard to the contents of the letter. The letter, therefore, and its contents, are a part of the *res gestæ*.

The court did not err in permitting the jury to retire into the jury room and there read the letter to themselves. The obscenity of its contents is a sufficient reason for the action of the court. The defendant consented that the jury might retire and read the letter to themselves. Admitting, for the sake of argument, that the letter was irrelevant, and for that reason was incompetent, this is no reason why a new trial should have been granted in this case.

The guilt of defendant, as charged in second count of the indictment, was clearly established by proof in the cause, other than the letter. "The mere admission of objectionable evidence will not be a sufficient cause for sending a case back for a new trial, when the evidence was sufficient to support the verdict, without the objectionable testimony." *Stephens v. Crawford*, 1 Kelly, 574, 580. *State v. Engle*, 1 Zabriskie, (N. J.) Rep. 347. *State v. Ford*, 3 Strobb. (S. C.) Rep. 517, 526, note.

There is no error in the instructions given. They put the jury in possession of the law applicable to the case. The instructions refused were bad and the court ought to have refused them.

The first and third instructions refused are wrong, for the reason that they assume that if defendant shot, while in a heat of passion, he must be acquitted. Malice is no ingredient of the offence charged in the second count of the indictment. If malice be wanting, the offence charged in the first count has not been committed, and so the court, in the instruction given, inform the jury.

*H. Dusenbury*, for State, cites *Foster*, 290, 291, 294. 1 *Russell*, 435 (note.) 1 *Haw. P. C. c.* 62, s. 1. *Ros. Crim. Ev.* 260. 2 *Ld. Ray.* 1498. 1 *Hale*, 453. 2 *Stark. Ev.* 517. 4 *Black. Com.* 185.

*RYLAND*, Judge, delivered the opinion of the court.

The defendant was indicted for an assault on one *Lewis Dorsheimer*, with intent to kill. The first count charges the assault to have been made feloniously and wilfully, on purpose and of malice aforethought, by shooting at him, the said *Dorsheimer*, with a pistol, with intent to kill him.

The second count charges the assault and the shooting to have been made feloniously and wilfully, with the intent wilfully and feloniously to kill said *Dorsheimer*.

The defendant plead not guilty. The jury found him guilty on the second count and fixed his punishment at two years imprisonment in the penitentiary. He moved for a new trial, and this motion being overruled, he excepted, and brings the case here by appeal.

The bill of exceptions preserves the instructions given and refused, and also the objections made to evidence, which was admitted against the defendant, as he thinks, improperly.

There was a fight between the defendant and *Dorsheimer*, which the latter commenced. In the fight, *Dorsheimer* got the defendant down on the pavement and choked him, until his tongue was out and his eyes stretched. When *Dorsheimer* let him go, he, *Dorsheimer*, was in the house, up stairs, and *Williamson* shot with a pistol at him, as he ran up the stairs, but did not hit him. It seems that *Williamson* had written a letter about his own wife, to one *Mr. Mann*; that *Dorsheimer* had married the daughter of *Mrs. Williamson*, by a former



husband ; that Mann had given this letter to Mrs. Williamson, and that, on the morning of the affray, Dorsheimer had received the letter from Mrs. Williamson and went to Williamson with it, and in this manner brought about the fight. The letter was exceedingly obscene and vulgar, and in every way unbecoming a husband and a man. The State offered to read this letter to the jury. It was objected to by defendant, as incompetent testimony. The State proved that the letter was in the handwriting of Williamson, and the court decided that it was competent evidence. This ruling of the court was excepted to.

After the decision of the court that the letter was competent and relevant testimony, the circuit attorney proposed to let the jury have the letter and retire to their room, and there read it. This was, under the circumstances, agreed to by the defendant, as the letter was not such as should be read in public.

1. We are of opinion, that the court should have rejected this letter as evidence. It had no relation to this prosecution, and was not a part of the *res gestæ*. Its tendency was, to prejudice the mind of the jury against the defendant, but could not assist them to form one idea either for or against the guilt or innocence of the accused, as regards the charge in this indictment. This letter had nothing to do with the assault with intent to kill, on the part of Williamson. But it might very quickly rouse the feelings of honorable and high-minded jurors to a degree of indignation against the defendant, no-wise propitious to a calm investigation and correct conclusion upon his innocence or guilt. For this error, therefore, this case must be sent back.

2. The instructions given for the State have also been argued by defendant's counsel, as being improper and illegal. Some of these instructions are erroneous. The instructions do not put the case fairly before the jury. The first one given is wrong: "If the jury believe from the evidence, that the defendant, in St. Louis county, and within three years next

preceding the finding of this indictment, did commit an assault upon the person of Lewis Dorsheimer with a pistol, and did so assault, with the intent to take the life of Dorsheimer, you will find him guilty, as charged in the second count of the indictment."

This instruction takes from the jury all consideration in regard to provocation, or even self-defence.

Again, "If the jury believe defendant shot at Dorsheimer, with intent to kill him, the offence described in the second count is complete, and in such case, it is entirely immaterial whether the shot took effect or not." This is equally objectionable; it is not the law of this case. The court should have been more careful in properly informing the jury of the law arising on the facts in this proceeding. The instructions seem to have been drawn with too much haste on both sides.

The judgment of the Criminal Court is reversed and this case is remanded for further trial, on which the letter is not to be read nor received in evidence, and the instructions noted above not to be given. The other Judges concur herein.

END OF MARCH TERM.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
OF THE  
STATE OF MISSOURI,  
JULY TERM, 1852, AT JEFFERSON CITY.

INGRAM AND HATHAWAY, Appellants *vs.* TOMPKINS et al.,  
Respondents.

1. An allegation in a bill in equity, not denied in the answer, is not admitted, but must be proved.
2. A., owning several tracts of land subject to the lien of judgments in the county, executes a bond to convey one of them to B., by deed of general warranty. Before B. records his title, an execution from another county is placed in the hands of the sheriff, which is levied on the other tracts owned by A., and they are sold, and C. becomes the purchaser. Afterwards, and before B. pays the purchase money, executions upon the judgments first named, are levied on the tract sold to B., and it is sold, B. buying it in. *Held*, B. cannot maintain an action against C. for contribution. If C. is liable to any one in such an action, it is to A.

*Appeal from Cooper Circuit Court.*

*Hayden and Leonard*, for appellants.

I. The equity of Tompkins, under his deed of trust, which was not recorded until after Brown's execution came to the hands of the sheriff, was extinguished by the sale under that execution, at which Gamble purchased. That deed of trust was thenceforth void, and Gamble cannot invoke to his relief the previous equity of Tompkins under it. *Vide Digest*, 1835, tit. Conveyances, p. 123, secs. 30, 32. *Hill v.*

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*Paul*, 8 Mo. 479. *Reed v. Heirs of Austin*, 9 Mo. 722. *Jones v. Luck*, 7 Mo. 552. *Helm v. Logan's heirs*, 4 Bibb, 78. *Graham v. Samuel*, 1 Dana, 168.

II. Admitting that we cannot maintain the position that the three elder judgments must be satisfied exclusively out of the lots purchased by Gamble, our position then is, that these lots in Gamble's hands, must contribute rateably to the satisfaction of those judgments, and we submit the following points and authorities in support of this position :

1. When there are several tracts of land subject to a common burthen, each tract contributes to the satisfaction of that burthen in proportion to its value. *Herbert's case*, 3 Rep. 13. 2 Bac. Abr. title Executions, letter B 4, pages 696, 698. 1 Story's Equity, sec. 635 a.

2. If there are several tracts of land subject to the lien of an elder execution, and one of them is sold under a junior judgment, the purchaser takes the land *cum onere*, and the land in his hands is the principal debtor for its proportion of the elder judgment. Rev. Stats. 1825 & 1835, "Judgments and Decrees," secs. 4 and 5. *McNair v. O'Fallon*, 8 Mo. 200. *Prewitt v. Jewell*, 9 Mo. 736. *Waters v. Stewart*, 1 Caine's cases, 47. *Russell v. Dudley*, 3 Met. 148. *Averall v. Wade*, 10 Eng. Cond. Chan. Rep. 498. In Pennsylvania, the rule of the common law in relation to the sale of personal property under execution prevails, and the sale of real estate on execution extinguishes all liens, and passes an unincumbered title to the purchaser, and the liens that existed on the land are transferred to the money, which is distributed according to the priority of the liens. *Bank of North America v. Fitzsimons*, 3 Binn. 358. *Semple v. Burd*, 7 Serg. & Rawle, 290. *Commonwealth v. Alexander*, 14 Serg. & Rawle, 257. *Fickes v. Ersick*, 2 Rawle, 166. *Presbyterian Corporation v. Wallace*, 3 Rawle, 109. *Stackpole v. Glassford*, 16 Serg. & Rawle, 163, and cases collected in Wharton's Digest, 1 vol. 703, 710.

In New York, the rule which prevails as to personal property

does not apply to execution sales of real estate, and there the purchaser takes the land subject to the prior liens. *Jackson v. Mills*, 13 Johns. 463. *Lambert v. Paulding*, 18 Johns. 311. *Marsh v. Lawrence*, 4 Cow. 461; and our statute adopted the New York rule.

3. Gamble purchased subject to the lien of the three elder judgments, which were also a lien upon the land purchased by the complainants, and thereby the land in Gamble's hands became primarily liable for its due proportion of those judgments. So much of the value of the land remained in his hands to be applied to that purpose; and the plaintiffs, who purchased from Smith, are interested in the application, because it discharges their lot from so much of the common burthen.

4. The contract between Gamble and Tompkins, in relation to the proceeds of the sale of the land, bought by the former, cannot relieve it from its liability to contribution. Tompkins' title is extinguished by the execution sale at which Gamble purchased, and of course all the equities that attached to it against the complainants, as subsequent purchasers, are extinguished with it. The contest here is with Gamble's title, and not with that of Tompkins. It is a strange equity in favor of an extinguished title that releases Gamble's lot from the burthen of the elder judgments, robs Smith, the judgment debtor, of that part of the value of his lot that remained in Gamble's hands, and subjects the plaintiffs, who purchased of Smith, to the payment of that portion of the elder judgments that Gamble agreed to pay when he purchased, and which the law permitted to remain in his hands for that purpose.

III. Thus far our case assumes that Gamble, by his execution purchase, acquired, under the doctrine of *Hill v. Paul*, a title paramount to Tompkins' mortgage; in other words, a valid title in fee to the property, subject only to the lien of the three elder judgments — a title that entirely extinguished Tompkins' mortgage. If that case is now to be reversed, then

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Ingram et al. v. Tompkins et al.

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Gamble takes the title subject both to Tompkins' mortgage and the three elder judgments. Tompkins' purchase of the land under the mortgage sale cannot be allowed to stand. He has the title without value (\$5,) and with full notice of all the equities in the case, under a sale made expressly to defeat the plaintiffs' rights. Gamble bought at the sheriff's sale, and paid his money upon the faith of the decision of this court. Smith, the judgment debtor, and others interested in the subject, as Smith's creditors, suffered the land to be sold under Tompkins' mortgage for a nominal sum, under the faith of the same decision; and now, if that decision is to be reversed, and the purchase under Tompkins' mortgage to stand, the result is that Gamble loses his money, the elder judgments are thrown upon the plaintiffs' lot, and Tompkins gets a lot worth four thousand dollars for five dollars, and releases his whole debt against Smith, his debtor. These are the equities, or rather the iniquities that the court is now asked to administer.

*Adams and Tompkins*, for respondents.

1. When Brown's execution came to the hands of the sheriff of Cooper county, it became a lien on all Smith's real estate in Cooper county, subject alone to the elder judgments, and among the balance it was an equal lien on the tract purchased by complainants, as their title bond, being unrecorded, was void as to said execution. A levy and sale on that tract under Brown's execution, would have passed the title. Hence, the sale of the other tracts under Brown's execution, was a prior sale, in point of law, to the purchase by complainants, and left the tract purchased by complainants, with the remainder of Smith's real estate, first subject to the payment of the elder judgments, before resort could be had to the purchasers under Brown's execution. *Hill v. Paul*, 8 Mo. 479. *Reed v. Austin's heirs*, 9 Mo. 722. *Frothingham v. Stacker*, 11 Mo. 77. Rev. Stats. 1835, title "Conveyances," sec. 42, and title "Executions," sec. 16. Laws of Mo. 1839, title



"Executions," sec. 3. *McCourtney v. Sloan*, 15 Mo. 95. 4 Bibb, 78.

2. The purchases under Brown's execution were prior, in point of law, to the purchase by complainants, and the true rule of equity in all such cases is, that, as between purchasers in succession from the same grantor, no right of contribution exists to pay elder judgments binding the whole property. The property which, in point of law, passed from the grantor or debtor last, must be first resorted to. *Clowes v. Dickenson*, 5 Johns. Ch. Rep. 239. 1 Johns. Ch. Rep. 412. 19 J. R. 491. *Fonblanque's Eq.* 514 and op. page, (notes.) 3 Leigh, 532. 4 Kent, 6th edition, 179, note a. *Mayo v. Stanley*, 10 Serg. and Rawle, 455. Barr's Penn. Rep. 268.

3. In this case, the purchasers under Brown's execution are not only entitled to protection as purchasers for valuable consideration without notice, but they also stand in the shoes of the execution creditor, and are entitled to all his rights in reference to the elder judgments; and after the levy of Brown's execution, a court of equity would have forced the elder judgments on the other real estate, including the parcel purchased by complainants, for satisfaction, before resort could be had to the real estate covered by the levy under Brown's execution. This would have been done upon the principle that where a creditor has a lien upon several funds or parcels of property, and another creditor has a lien on one of the funds or parcels of property, the senior creditor must first exhaust the funds which the junior creditor cannot touch, in order that the junior creditor may avail himself of his only security. See authorities cited on the second point, *et passim*.

4. When Brown's execution was levied, the complainants had paid no part of the purchase money to Smith, but the whole remained in their hands, and even up to the 11th of March, 1845, the time of the execution sale, \$2,182 remained unpaid, and their equity, if they have any, was upon this fund, which they might have applied to the removal of incumbrances. They are not in the condition of purchasers for valuable consideration without notice. To claim such protection,

the purchase money must have been actually paid, and even that would not have put them on an equality with Brown's execution sale. 7 J. Ch. Rep. 65. 1 Atk. 538. 2 Atk. 630. 3 Atk. 304.

5. Even upon the hypothesis of the complainants, that the parcel purchased by them was only liable for its *pro rata* share of the incumbrance, they, by suffering it to be sold, and purchasing it themselves, at sheriff's sale, are concluded by their own act, and could not avail themselves of any such equity, even if it had existed. They were unwilling to rely upon the title they already had, but preferred purchasing an independent title at sheriff's sale, and now wish to force others to aid them in paying for that title. Will a court of equity lend its aid to such speculators, and relieve them from the consequences of their own act? The hazard of the bargain at the sheriff's sale was their own. If they had bought it for a nominal amount, they would have received all the benefit, and the whole amount of the incumbrance would thus have been thrown on the other parcels, (admitting that these parcels were equally liable to the incumbrance,) and if the bargain proved disastrous, they made it themselves, and must abide the consequences.

6. Brown's execution, to satisfy which would have taken all Smith's property, including the parcel purchased by complainants, was an equal lien upon this parcel with the others upon which it was levied, yet it was not executed, although equally liable, and paid no part of that debt. What equity have the complainants to ask contribution from those parcels which have the whole weight of that execution?

7. The complainants' title bond was void as to the defendants, as they had no actual notice of it. Possession was not actual notice, but at most only evidence of notice, or in other words, constructive notice. The defendants deny all notice, and to overturn their answers would require two witnesses or one witness and strong corroborative circumstances. See following authorities, as to difference between actual and con-

structive notice. 1 Story's Eq. sec. 3, 99, &c. Newland on Contracts, ch. 36, page 504, &c. Sugden on Vendors, ch. 17, secs. 1, 2, and ch. 16. 4 Kent Com. 179.

8. So far as parcel one is concerned, it is not only protected by the sale under Brown's execution, but it is also protected by an elder title, under Tompkin's deed of trust, under which it was sold and is now held. This deed of trust was older than the complainants' bond for title and duly recorded before the bond for title, and of course this sale, under the deed of trust, passed the property from Smith before the purchase made by complainants.

SCOTT, Judge, delivered the opinion of the court.

This was a bill in chancery, filed by the complainants, Hathaway and Ingram, against the defendants, to obtain contribution under the following circumstances. Such of the facts only will be stated as are necessary to present the questions involved in the case.

Charles H. Smith owned a considerable real estate, consisting mostly of lots in the town of Boonville, in Cooper county. This estate was subject to the lien of several judgments, rendered against him, in the years 1842 and '3, for a considerable amount. On the 7th of February, 1844, Smith executed to the complainants a title bond, by which, upon the payment of \$3200, he promised to convey to them, by deed, with a general warranty, lot 156 and part of lot 157, being a portion of the property above mentioned. This title bond was not recorded until the 23d day of November, 1844. The purchase money was payable in equal instalments, which were severally due 9th November, 1844, July 9th, 1845, and 9th March, 1846, and bore ten per cent. interest. On the 15th March, 1845, Smith, by a deed with general warranty, reciting that the consideration of \$3200 had been paid and secured to be paid, conveyed the lots above described to the complainants. This deed was recorded 12th April, 1845. The remainder of Smith's real estate consisted of eleven parcels, which, for the sake of convenience, were numbered numerically.

On the 14th day of February, 1844, Geo. Brown, in the St. Louis Circuit Court, recovered judgment against Smith, as garnishee, for the sum of \$4794 38. On the ——— day of September, 1844, an execution on this judgment was placed in the hands of the sheriff of Cooper county, which was levied on five of the eleven parcels of ground above mentioned, on the 24th October following. By virtue of a *venditioni exponas*, this property was sold on the 11th day of March, 1845, at which sale H. R. Gamble became the purchaser of parcels one, two, five, for the sum of \$1351, in trust for his clients, who were the beneficiary owners of the judgment on which the execution issued. W. Adams, parcel number three, for \$171; and parcel number four was sold to G. W. Morton, for the sum of \$225. On the 2d March, 1845, by deeds, with general warranty, reciting the payment of the consideration money, which was \$3200, the complainants conveyed to two different purchasers the lots they had bought from Smith.

From the view taken of this case, it is not deemed necessary to state the facts in relation to the matter of Jos. Tompkins.

Afterwards, Benjamin Tompkins, acting as trustee for one who was interested in Smith's estate, purchased the judgments against Smith, which were mentioned in the commencement of this statement, on which executions were issued, which were levied on the remainder of Smith's estate, being parcels numbered six, seven, eight, nine, ten and eleven, and also on the lots conveyed by Smith to the complainants; and on the 18th September, 1845, the said parcels were sold, and not being sufficient to satisfy the executions, the lots purchased by the complainants were sold for about \$1500, of which the sum of \$1400 was applied to their satisfaction, and the residue paid to the complainants, they being the purchasers of the lots conveyed to them by Smith. The judgments, under which the last mentioned executions issued, as has been before said, were liens upon all of Smith's real estate in Cooper county, and all his estate, but that last sold, had been exhausted by Brown's execution.

Under this state of facts, the complainants maintained, that they were entitled to contribution from the purchasers at the sale made under Brown's execution, as the real estate sold at that sale was subject to the liens of the judgments under which the lots they had purchased from Smith were disposed of.

On a hearing, there was a decree dismissing the bill, from which this appeal is taken.

The opinion I hazard in this case is my own, and it will be prefaced with the remark, that it is based upon the principle asserted in many opinions of this court previously delivered. That principle is, that the lien of a judgment or execution creditor on real estate, is preferred to a purchaser from the debtor who holds by an unrecorded deed or instrument of writing.

1. It does not appear, from any thing in the cause, that the purchase money was ever paid by the complainants for the lots which they purchased of Smith. From the date of the deed and the recital therein contained, the most favorable construction that can be put upon the transaction is, that only one of the instalments was paid, as the deed was executed before the others were due, and it is recited that the purchase money was "paid and secured to be paid." The charge in the bill that the purchase money was paid, is no evidence of the fact, although uncontradicted by the answer, it being a rule in equity that, if the answer omits to deny a fact charged in the bill, it is no admission of the fact. The plaintiff may object to the answer for insufficiency in this respect, as he may for insufficiency as to any other fact charged. But, if he takes no exception and the cause goes to a hearing on the general replication, it is a waiver of the exception and the plaintiff must prove his case. *Gamble v. Johnson*, 9 Mo. Rep. 625.

2. I am utterly at a loss to conceive on what legal or equitable ground the complainants claim a foothold in a court of justice. They have bought land for which, at most, they have only paid one-third of the purchase money. For what do they

claim contribution? Is it in respect to the purchase made from Smith or to that which they made at the sheriff's sale? How are they injured? They cannot be made to pay for land the title to which has failed. If they lose the first instalment, then, by their management, they will have obtained the lots for nearly one-third less than they agreed to pay for them. If, by reason of the sale of the lots, Smith has been prevented from collecting the purchase money, then he is the injured person, and the suit should have been brought in his name and for his benefit. Had he succeeded in such a suit, the only decree that would have been made, would be one allowing an additional credit on Brown's execution, (for the greater portion of it is yet unsatisfied,) and as Smith is utterly insolvent and a suit against him would have resulted in such a decree, it was deemed most expedient, it may be supposed, to institute the action in the manner it has been, as the relief, in the other form, would have been only nominal. The complainants should have placed the motives of their conduct above all suspicion. If they relied on the title obtained from Smith, they should have paid the balance on the execution and prevented a sale of their property. They would not then be in the situation in which they have voluntarily placed themselves, where they could make a profit or not according to the result of chances. They have suffered their property to be sold and got a title superior to and older than that obtained from Smith, and that might have been purchased for a nominal sum, in which event they would have obtained property worth upwards of \$3000, for literally nothing. If their hazard has not resulted as favorably as was anticipated, can they now ask relief from a court of justice?

If even Smith had received his purchase money, then the complainants cannot have relief, because their title bond was unrecorded at the time that the execution of Brown came to the hands of the sheriff. Their title was at the mercy of that execution; it was void as to that writ, and they cannot now come in and claim contribution after a sale has taken place under it. To hold that, would be to maintain that a title which



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was void as to an execution, may, after that execution has been executed, place itself upon an equality with the title acquired under the execution. After the levy of Brown's execution, had the remainder of Smith's property, including the lots sold to the complainants, been also levied upon by executions on the elder judgments, and had the sales taken place on the same day, if, after the last levy, all except complainants' lots had been exhausted, could they then have come in for contribution against Brown's execution? That execution might have extinguished the title of the complainants, and, because it was spared, shall it now come in and claim an equality with it, and thereby diminish that fund for its satisfaction which might have been swelled by its own extinction?

Had the complainants' title paper been recorded, they having paid the purchase money, the question which is sought to be made in this case might have arisen. That question is an important one, and, situated as the court is, in regard to this case, I do not wish to express any opinion in relation to it. In my view, it is a new one, and is not affected, as I conceive, by any thing contained in the cases of *Prewitt v. Jewell*, 9 Mo. Rep. and *McNair's heirs v. Mullanphy's heirs*, 8 Mo. Rep. Decree affirmed.

Judge Ryland concurs in affirming the decree, though not in all the views of this opinion.

Judge Gamble did not sit.

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MORGAN *et al.*, Appellants, *vs.* RICHARDSON, Respondent.

1. A judgment confessed by one partner, in the name of himself and his co-partner, is void as to the co-partner, and an execution issued thereon is properly quashed on his application.

*Appeal from Greene Circuit Court.*

*Leonard*, for appellants.

The judgment confessed is not void, even against the non-  
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confessing partner; but at most, is only voidable upon good cause shown. *Green v. Beals*, 2 Caine's Rep. 254. *Motteux v. St. Aubin*, 2 Black. Rep. 1133. *Denton v. Noyes*, 6 Johns. Rep. 295. *Wood & Oliver v. Ellis*, 10 Mo. Rep. 383.

A good defence to the demand on the merits is always part of the good cause for setting aside a judgment alleged to have been confessed without authority. Here, the non-confessing partner has no merits and pretends to none.

*Hayden*, for respondent.

The clerk of the circuit court is a mere ministerial officer, under the constitution of the state, and has no judicial power to render a judgment in vacation.

The confession was made by J. M. Richardson, after the dissolution of the partnership. It is not competent for one partner to bind another by deed, even during the continuance of the partnership, nor to bind him in a more solemn form, by a confession of judgment. 1 Wend. 333 and following. *Ib.* page 326 and following, and authorities there cited. *Collier on Partnership*, 260, and notes.

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding to set aside a judgment and execution thereon, confessed in vacation, in the name of A. & J. M. Richardson, to the appellants, under the 22d article of the new code of practice. Achilles and J. M. Richardson were partners in trade, and indebted to the appellants, for merchandise. The indebtedness was evidenced by a promissory note, executed in the name of the firm. The confession was authorized by J. M. Richardson alone, and after the dissolution of the partnership between him and Achilles Richardson. The execution was levied on goods belonging to A. Richardson. The court below set aside the judgment against A. Richardson, and quashed the execution.

1. The facts in this case stand admitted by the demurrer to the petition, and we are at a loss to conceive the ground upon which the proceeding can be sustained against A. Richardson.

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The case of *Green v. Beals*, 2 Caine's Rep. is an authority to show that the judgment confessed by J. M. Richardson was void as to A. Richardson. The cases of *Motteux v. St. Aubin*, 2 Black. 1133, and *Denton v. Noyes*, 6 Johns. Rep. are not applicable to the circumstances of this case. It cannot be maintained, that a partner, either before or after the dissolution of the co-partnership, has authority to confess a judgment for his co-partner. The authorities are abundant to show that one partner cannot confess a judgment which will bind his co-partner. *Crane v. French*, 1 Wend. 311. *McBride v. Hagan*, 1 Wend. 327. We can see no difference in principle between setting aside the judgment and restraining an execution upon it, as either mode of action is based upon the nullity of the proceeding, which is not permitted to be used as a foundation for any future action against the party, for whom it has been unwarrantedly entered.

It does not appear that the judgment against J. M. Richardson has been vacated, nor will we interfere with it. The other Judges concurring, the judgment below will be affirmed.



MORRISON, Appellant, vs. EDGAR, to use of Brent, Respondent.

1. A. sold B. certain slaves, warranting his title to be good. Held, as long as B. remains in undisturbed possession of the slaves, he cannot set up, as a defence to a note given for the purchase money, that, at the time of the sale, the title was not in A.
2. In such a case, there is no failure of consideration, within the meaning of the 14th section of article five of the act concerning "Justices' Courts," (Rev. Stat. 1845.)

*Error to Cooper Circuit Court.*

*Hayden*, for plaintiff in error.

1. It was competent and legal for Morrison, in his defence to the action, to show that the note sued on was obtained from him without consideration, or that the consideration of the note, if any, had failed, and consequently the court erred in rejecting the evidence offered by him to the jury, to prove that

Robert Brent had no right or title to the negroes for which he had given the note. Digest 1845, tit. Justices' Courts, article 5, sec. 14. 6 Mo. Rep. 642-3, *Jones v. Shaver*. 10 Mo. Rep. 267-8. 7 Cowen, 332. 11 John. 50. 8 Cowen, 31. 7. John. R. 26. 17 ib. 303. 7. T. R. 350.

2. It was competent for Morrison, under the rules of the common law, independent of the statute, to make the proof upon the trial which was rejected by the court. The covenant in the bill of sale of the negroes, made to Morrison by Brent, warranting the title to said negroes to be good in Morrison, his heirs, &c., and that the same was free from all claim or claims whatever, is equivalent to the covenant of seizin, and that the title to the negroes was then free from incumbrance, and that Brent had a good title, which was thereby conveyed to Morrison, and that, therefore, the covenant so made by Brent, was false and fraudulent, (for he well knew he had no title,) and was broken at the very time it was made. 4 Kent, sec. 67, p. 471. 4 Bibb, 304-5. 2 Marsh. 217, 218, 219. 2 Wheaton, 13. 3 Pick. 452, *Knapp v. Lee*. 6 Mo. Rep. 642, 643. 11 Johnson, 50. 2 Kent, 473. 10 Mo. Rep. 267-8. 7 John. R. 26. 17 J. R. 303. 8 Cowen, 31. 7 ib. 332. 7 T. R. 350.

3. If the warranty were one prospective in its nature, in this suit the court will not compel the defendant to part with his money, for a thing which the plaintiff had no right to sell, or interest in, nor any power to convey to Morrison, because the court being bound to observe the rule in equity, will not specifically enforce a contract, upon the application of a party, who has given no consideration for the thing he seeks, nor do a thing which will lead to litigation or circuity of action between the parties.

*Adams and Miller*, for defendant in error.

I. To constitute a breach of warranty of title in the sale of chattels, it is necessary that the vendee should be evicted—that he should be actually dispossessed of the property, under the judgment of some court having jurisdiction of the case; and,

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therefore, the court very properly rejected the evidence about the title to the slaves. 1 Smith's Leading Cases, 181-2. *Vibbard v. Johnson*, 19 Johns. Rep. 79. 10 Wend. 384. 12 ib. 450. 2 Kent. Com. 472-3. 1 John. Rep. 517. 13 J. Rep. 225. 4 Dallas, 436 (note.) 7 John. Rep. 258. 2 Marshall's Rep. 218. 11 J. R. 122. 2 Caine's Rep. 192. 2 U. S. Digest, Supplement, No. 310, p. 725.

GAMBLE, Judge, delivered the opinion of the court.

Edgar, suing for the use of Brent, commenced his action before a justice of the peace, against Morrison, upon a promissory note for one hundred dollars, which was payable to Brent.

Brent, by his agents, sold certain slaves to Morrison, for nine hundred and fifty dollars, of which eight hundred and fifty dollars was paid in cash, and the present note was given for the balance of the purchase money. At the time of the sale, a bill of sale for the slaves was made, in which a warranty was inserted, by which Brent warranted the "title to said negroes to be good in the said Morrison, his heirs and assigns forever, free from all legal claims whatever."

The justice having given judgment for the plaintiff, the case was brought by appeal to the Circuit Court, and upon the trial there, the defence was set up by Morrison, that, at the time of the sale, the title to the slaves was not in Brent. It was admitted by Morrison that, ever since the sale, he had had the undisturbed possession of the slaves. The Circuit Court decided against this defence, and the question now to be considered is, whether it is a valid defence to the suit, upon the present note.

Although this note had been assigned by Brent to Edgar, yet it was admitted that, at the commencement of the suit, Edgar was holding it for Brent; consequently, the question is one between Brent, the payee, and Morrison, the maker.

1. There have been many decisions made in the courts of the different states, upon questions similar to that arising in the present case, and these decisions are by no means in har-

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mony with each other. In *Frisbee v. Hoffnagle*, 11 John. R. 50, it was held, that the maker of a promissory note, given for the consideration money of land he had purchased, might defend himself against an action upon the note, by showing that the payee, who conveyed the land to him, had not the title, although he had never been disturbed in the possession. In *Vibbard v. Johnson*, 19 John. R. 77, the case of *Frisbee v. Hoffnagle*, was not cited in the argument, nor referred to in the opinion of the court, but Chief Justice Spencer stated the law to be, "that it was not competent for the purchaser to dispute the title of the vendor, unless he had been charged, at the suit of another person, who had, after contestation, shown a better title." The action, in this last case, was to recover the value of a chest of tea, sold by the plaintiff to the defendant, and for which the defendant alleged that he had paid a third person, who was the real owner of the tea, thus bringing up the question whether the plaintiff had any title to the thing sold.

The case of *Frisbee v. Hoffnagle* has been questioned in *Lloyd v. Jewell*, 1 Greenl. R. 355, and is understood to be overruled in New York, in several subsequent decisions, as well as by *Vibbard v. Johnson*. *Whitney v. Lewis*, 21 Wend. 131. *Lamerson v. Marvin*, 8 Barb. Sup. C. R. 9.

Although the decisions in other states are not uniform, yet the weight of authority is opposed to the defence attempted in this case, where the purchaser holds the undisturbed and undisputed possession of the property under the sale. The defence is essentially a denial of the consideration of the contract, upon which the action is brought, and it is but reasonable that a person who holds the possession of chattels, under a purchase, shall not be allowed to deny the consideration of his promise to pay for them, while his possession is not disturbed.

2. But it is said, that the statute regulating the proceedings in justices' courts, in the fourteenth section of article five, declares a rule, by which this defence is admissible. That section authorizes a defendant, who is sued as the obligor in a



bond, or as a maker of a note, to impeach its consideration and show a partial or total failure of the consideration thereof. It is obvious that the present is not a case properly of a failure of consideration. It is not alleged that any thing has occurred, since the sale, by which the relations of the parties to the property sold have been changed or affected. If there was a consideration at the moment of the sale and transfer of the possession, it still exists. The section referred to authorizes a defendant to show, not only that a note was made without consideration, but that a bond, upon which he has been sued, was made without consideration, and it authorizes the defence of a partial or total failure of the consideration, either in case of a bond or a note. Whether the fact relied upon by the defendant, that Brent's title to the slaves was not good, constitutes a defence to the present note, while the defendant still continues in the possession of the slaves, depends upon the question, whether it establishes a want of consideration for the note. The authorities all agree that between the original parties to a note, the want of consideration is an available defence, but if, under this admitted law, a purchaser of property, who holds the undisturbed possession, cannot defend himself against his note for the purchase money, on the ground of a want of consideration, because of a defect of title, it is not perceived how the statute has changed the law in this respect. It allows the consideration to be impeached, but it does not change the cases in which there is or is not a sufficient consideration. If the purchase of the property and the continuance of the possession was a sufficient consideration, under the general law previously existing, the statute has not changed the law in such case. This section of the statute, then, does not apply to the present case, nor authorize the defence here attempted.

But it is insisted that the peculiar language of the warranty, in the bill of sale, binds Brent, not merely to defend the title to the slaves against all opposing claims, but amounts to a covenant of present right and title to the slaves, similar to the covenant of seizin in the conveyance of a tract of land, and

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that, consequently, if he had not title, there was no consideration for the note. If the construction of the instrument contended for was admitted to be correct, the consequence derived from it would not necessarily result. Whatever may be the meaning of the language used in this covenant, the note will still rest upon sufficient consideration, while the maker continues in undisturbed possession of the property sold. But it is not thought necessary to dwell upon this view of the case. The particular language of this covenant does not vary its effect from that produced by the ordinary form of covenants of warranty. The seller warrants "the title to the negroes, free from all legal claims," and the use of the words, "*to be good* in the said Morrison," &c., does not change the mode in which the seller is to be held responsible for the existence of a better claim to the property, or in which the superiority of the adverse claim is to be ascertained.

The judgment of the Circuit Court is, with the concurrence of the other Judges, affirmed.

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RICHARDS, Appellant, *vs.* GRIGGS *et al.* Respondents.

1. After an administrator, upon a settlement, has been adjudged to pay over a sum of money, he is subject to garnishment in a suit against the person in whose favor payment has been adjudged.
2. To constitute a valid assignment of a debt not evidenced by bond, bill or note, as against the debtor, notice must be given to him; and if, after an assignment without notice to him, judgment is obtained against him, as garnishee, in a suit against his original creditor, he will be protected.

*Appeal from Polk Circuit Court.*

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill of interpleader, begun by the appellant, Richards, against Robert Vermilion, who sues to the use of William Griggs, and against Arrington Simpson. Richards, the appellant, held in his hands, as ad-

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ministrator of L. Richards, the sum of \$200, which, by an order of the County Court of Polk county, he was required to pay to the widow of said Leonard Richards, as her dower. Vermilion sued Arrington Simpson and recovered a judgment against him, and no property being found to satisfy the execution on said judgment, Meridy Richards, the appellant, was summoned as a garnishee, on the ground that the widow of L. Richards had assigned to Arrington Simpson the said sum of \$200, due by the appellant, Richards, to her as dower. These facts appearing, the justice rendered judgment against Richards, the garnishee, for the sum of \$54 39, debt and costs, on which execution issued. Richards, the appellant, then filed a petition praying that Vermilion and Simpson might interplead, and for an injunction. The injunction was granted.

The foregoing are the facts of the case, as it appears from the proceedings in the cause. Arrington Simpson states in his answer, that before Richards was garnished at the suit of Vermilion, he had assigned the debt due from Richards to him, by virtue of the transfer of the widow Richards, to William and Moses Simpson. It does not appear that Richards, the appellant, had any notice of this fact at the time he was garnished or at any time afterwards. The court dismissed Richards' bill, from which decree he appealed to this court.

1. In the case of *Curling & Robertson v. Hyde*, 10 Mo. Rep. 375, this court held that no person, having his authority from the law, and obliged to execute it, according to the rules of law, can be garnished; that an administrator, therefore, was not subject to the process of garnishment. But in the same case, it was intimated that if, upon a settlement, an administrator had been adjudged to pay a sum of money, it might be garnished in his hands, in a suit against him in whose favor the judgment had been rendered. Indeed, we can see no objection to garnishing an administrator on a judgment rendered against him. There is no difference in principle between such a judgment and any other. The amount is liquidated;

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it is payable absolutely, and the arresting of it in his hands can cause no more inconvenience in this, than in any other case. After an order on an administrator to pay a demand found due against the estate, it may be regarded as a personal liability, and not distinguishable from one due in his own individual character.

2. Richards, the administrator, had no notice of the alleged assignment to William and Moses Simpson. When debts are assigned which are evidenced by bond, bill, or note, the debtor is never at a loss to know to whom it shall be paid, as he is warranted in taking up the instrument, in whosoever hands it may be found. But not so with regard to those *choses*, whose existence is not witnessed by any such instrument. Anybody may obtain a copy of a judgment, or may make out an account, and a debtor or trustee pays debts of this character at his peril to any other person than him who is really entitled to them. Hence, the modern English decisions have settled that, in order to constitute a valid assignment of a debt of this kind, notice must be given to the debtor, and if, without such notice, he should pay it to his original creditor, he will be protected in it. Or if, after an assignment, another in good faith should obtain a second assignment for the same thing, and first give notice of his equity, he will be preferred to the first assignee. The amount of the doctrine is, that the bare assignment of such a *chose* in action, does not pass it away, without notice of the fact to the debtor, who thereby is informed of the real holder of the debt. If notice of the assignment is not communicated, it enables the original creditor to commit a fraud, as he may assign a second time, and such assignee, although he may take the precaution of enquiring of the debtor, yet he cannot ascertain from him the fact of a previous assignment, as it has never been communicated to him. *Dearle v. Hall*; *Loveridge v. Cooper*, 3 Russ. 1. Story's Eq. 2, 1835, a. Then William and Moses Simpson, according to these principles, had no perfect title to the debt, by virtue of their assignment. In ignorance of their rights,

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the debtor has suffered a judgment to be rendered against him for a portion of the debt, and he will be justified in paying it. Story's Conflict of Laws, § 403.

The other Judges concurring, the decree below will be affirmed.

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SCROGGIN AND SMITH, Plaintiffs in Error, vs. HOLLAND, Defendant in Error.

1. A widow is a competent witness for the interest of her deceased husband's estate.
2. In a suit against the securities on a note given for the price of a slave, a breach of the warranty of soundness may be set up by them in defence, though the warranty was to the principal alone, who is not joined.

*Error to Pettis Circuit Court.*

The facts are sufficiently stated in the opinion of the court.

*Hayden*, for plaintiffs in error.

I. The widow Brown was a competent witness to prove the unsoundness of the slave, because,

1. She was not interested in the event of the suit; she had received all her dower interest in the estate, and it was wholly insolvent. 2. She was competent, even though interested, and so would her husband have been, under the provisions of the practice act of 1849, had he been alive. See article 25, secs. 1, 2 & 3 of the code. 4 Mo. Rep. 361. *Patterson v. McClanahan*, 13 Mo. 507. 3. The facts were such as she acquired a knowledge of, through the medium of her own senses, and not from her husband, and, therefore, the rule which renders a wife incompetent to testify as to the conversation or confidential communications of the husband, does not apply. 7 Vermont Rep. 503-7. 13 Pickering, 445. 11 Mass. 285, 3 Binney, 366. 3 Phillips' Ev. 1555. 1 Strange Rep. 504. 6 East, 194. 1 Greenleaf Ev. secs. 253, 254, 338. 2 Strange, 504.

II. The court erred in permitting the plaintiff to prove that he offered to purchase the slave of Brown, after he had sold him to Brown, and that Brown declined to sell. Brown was under no obligation to sell. He had a perfect right to retain the slave and rely upon the warranty for his indemnity. His declining to sell did not tend to prove that the slave was sound at that time, or at the time of the purchase. Neither did the declarations of Brown, several months after his purchase, that he could sell the negroes for some \$500, or \$800 more than he gave Holland for them, tend to show that the slave Harris was sound. Brown might have got the slaves for less than the usual price, or they might have risen in value, or some one might have been willing to have given more than their worth in order to own them. Brown had a right to the full benefit of his purchase.

III. The position assumed by the defendant in error in this court, that the Circuit Court did not err in excluding the widow Brown as a witness, because the plaintiffs in error had not laid any foundation for the introduction of the proof they proposed to make by her, is not true in fact or in law. The foundation was laid in the answer, which states that the note sued on was given to secure the price of certain slaves warranted to be sound, and that one of the slaves was unsound, and died of that unsoundness. The defendants proposed to prove this unsoundness by the widow. If she was a competent witness, they had a right to prove by her any link in their chain of testimony, and when she was excluded, it was not necessary for them to complete their proof. They could submit to a verdict against them, and appeal, and have this error corrected.

*Adams and Wright*, for defendant in error.

I. No foundation was laid by the plaintiffs in error, in the court below, for any evidence about the warranty of the soundness of the slaves purchased of the defendant in error by Brown. There is nothing in the record to show, and there was no proof below that the note sued on was given for the slaves.



The note was given January 20th, 1850, payable twelve months after date, and the bill of sale was executed February 1st, 1850, and the consideration is expressed to be in hand paid. It is therefore immaterial what the ruling of the court below was, upon the point saved in the bill of exceptions.

II. Even if there was anything to show that the note was given for the slaves, the defence of unsoundness set up by the plaintiffs in error, was inadmissible. The warranty was not only made long after the note was given, but it was made to Brown, and not to the plaintiffs in error. He alone could have maintained an action for the breach of the covenant; and the plaintiffs in error could not deprive him of his right of action on the covenant, by setting up the breach in this case as a failure of consideration.

III. The widow of Brown was an incompetent witness, not only on the ground of her husband's interest, but upon the ground of public policy, which renders the husband or wife incompetent to testify to anything that occurred during the coverture.

IV. Brown's statements that he could sell the slaves for \$500 or \$800 more than he had paid for them, and his refusal to let the defendant in error re-purchase the slave Harris, are strong evidence that the slave was sound at the time of the sale. But if such evidence did not conduce to prove the slaves sound, in no view of the case could its introduction do the plaintiffs in error any harm.

*Napton*, for same.

I. The husband of Mrs. Brown, if alive, would not have been a competent witness, since he was not merely substantially a party, but the principal party defending the suit. He purchased the negroes, gave his note with Smith and Scroggin as securities, and it is for his benefit the defence of unsoundness is set up. The condition of his pecuniary affairs, at the time of the suit, does not affect the question. The new practice act has not changed the law in this respect, as secs. 2, 3 and 4 of art. 25 of that act show. The general principles of

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public policy and sound morality establish that it ought not to be changed.

II. If Brown was not a competent witness, then his wife was not, notwithstanding the dissolution of the marriage by death or divorce. The exclusion of a wife, in such cases, is based upon great principles of public policy, and the new practice act, although abolishing all incompetency arising from mere pecuniary interest, did not and was not intended to abolish this ancient rule of evidence. The text books are full of authorities on this subject. No case can be found, in which a wife has been permitted to testify for her husband, (dead or alive,) where he was a substantial party to the transaction. The case of *Beveridge v. Minter*, 1 Carr. and Payne, 364, is a nisi prius decision, directly contradicted by *Doker v. Hasler*, Ry. & Moo. 198, and by the general current of authorities; but, if it were the law, it does not touch this case. The wife in that case was called upon to prove the liability of her dead husband, not to exonerate, and the Chief Justice, putting the whole matter on the ground of interest, let her testify. It is manifest the same judge would have excluded Mrs. Brown in this case.

SCOTT, Judge, delivered the opinion of the court.

This was an action on a note for thirteen hundred dollars, against Smith and Scroggin, securities of James Brown. Brown purchased several slaves of Thomas Holland, the plaintiff, who warranted them to be sound. The note in suit was executed to secure, as it was alleged, part of the purchase money, a portion of it having been paid down, and bore date ten days prior to the bill of sale. The alleged unsoundness of one of the slaves, estimated to be worth seven hundred dollars, was the defence to the action. Brown afterwards died. On the trial, the warranty of the soundness of the slaves, contained in the bill of sale, was read, and some evidence, conducing to show the unsoundness of one of them, at the time of sale, and his subsequent death, was given in evidence to the jury by the defendants, when Mrs. Brown, the widow of James Brown, the

purchaser, was offered as a witness of the unsoundness of the slave. The testimony of this witness was objected to, and the court sustained the objection, and Mrs. Brown was excluded. It was admitted that Brown's estate was insolvent, and that his widow had received from it all to which she was entitled. The plaintiff, after some rebutting evidence, offered to prove that Holland, the plaintiff, proposed to buy the slave alleged to be diseased, and that Brown declined selling him, and stated afterwards, that he had made a good bargain, as he could sell the slaves for some \$500 or \$800 more than he gave for them. This evidence was objected to, but the court permitted it to go to the jury, to which an exception was taken. There was a verdict for the plaintiff, and a judgment thereupon.

1. The material question in this case is the admissibility of the evidence of Mrs. Brown, to establish the unsoundness of the slave. It is a well established rule, that the husband and wife cannot be witnesses for each other, for their interests are identical; nor against each other, on grounds of public policy, for fear of creating distrust and sowing dissensions between them, and occasioning perjury. This rule is said to be so important, that the law will not suffer it to be violated, even after the marriage has been dissolved, by the death of one of the parties, or by a divorce. It thus appears, that the grounds of this rule are two-fold—the identity of interest between husband and wife, and public policy—because the admission of such evidence might disturb the harmony of the conjugal state. It is not to be denied, that a disposition has prevailed in some courts to restrict the operation of the rule above stated. But this has been confined to cases in which the widow has been called upon to testify against the interest of her husband, or to disclose communications deemed confidential, or information derived from the society of, and intercourse with her husband's family. All the cases that have been cited and commented upon in the argument, on both sides, are of this latter class. In relation to this class of cases, we adhere to the opinion of Lord Alvanley in *Monroe v. Twisleton*, in which it was held,

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Scroggin et al. v. Holland.

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that a woman, who had been divorced by act of parliament, was not competent to prove a contract made by her husband previously to the divorce. The Judge observed: "To prove any fact arising after the divorce, this lady is a competent witness, but not to prove a contract or any thing else which happened during the coverture. She was at that time bound to secrecy. What she did, might be in consequence of the trust and confidence reposed in her by her husband." The above case, and those expressing contrary views, were reviewed in a late case reported in England, in 43 Com. Law, 232, *O'Connor v. Majoribanks*. In this case, the court rejects the distinction between communications which were of a confidential nature and those which were not so. It was said, such a limitation of the rule would very often be extremely difficult of application, and would introduce a separate issue in each cause, as to whether or not the communications between husband and wife were to be considered of a confidential character. It is sufficient, that the communication might have been of a confidential nature. And it was held, that in an action of trover by the personal representatives of a deceased husband, his widow was not a competent witness for the defendant, to prove that with her husband's authority she pledged the goods with him. We concur in the views above expressed, and see the difficulty of distinguishing between communications which are confidential, and those which are not so. It is obvious too, that if husband and wife were conscious that information derived from other sources than those of trust and confidence, could be evidence against each other, means would be resorted to, with a view to prevent, in many instances, information from being so acquired, which would be a source of endless broils and difficulties. The husband would not be willing that the wife should be in a situation to acquire this information. He might use means to prevent her obtaining it, and thus impose restraints which would fill her with mistrust and anxiety. This opinion is sustained by a great weight of authority in the American courts. *Stein v. Bowman*, 13 Pet. 219. *Robbins*

v. *King*, 2 Leigh, 142. *Brewer v. Ferguson*, 11 Humphreys, 565.

The case now before us is different from those which have been under consideration. In all those suits, the question was, whether the wife should be a witness against her deceased husband's interest, and she was excluded upon the ground of public policy, whose aim is to create and cherish between husband and wife the most boundless confidence, by stamping with a seal of secrecy, which death itself should not break, every transaction which transpired during their joint lives. Here, the wife is offered as a witness for the interest of her deceased husband's estate. She is, then, to be excluded, if at all, by reason of her identity of interest, and not on the ground of any public policy. There is no identity of interest between husband and wife after the death of one of them. In such case the wife is like any other witness, who, being incompetent at the time he acquires a knowledge of the facts about which he testifies, yet is afterwards rendered competent, by the extinction of his interest. After some examination, no case has been found in which the wife, under circumstances like those of the present case, has been excluded. She is now under no temptation to commit perjury for her husband. Her testimony, if contrary to the expectations of those who produce her as a witness, cannot affect the conjugal state. This is said in reference to the disqualification of the wife, resulting from the mere fact of the former marriage. If she has a pecuniary interest, she is disqualified by the common law. But by our late code, an interest in the event of a suit does not disqualify a witness.

In the case of *Coffin v. Jones*, 13 Pick. 443, a widow was permitted to testify for the interest of the estate of her deceased husband, and this case is similar to the one now before the court.

We are of opinion, that it plainly enough appears from the record, that the slave alleged to be unsound was a part of the consideration of the note on which this suit was brought.

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Wilburn's Adm'r v. Hall.

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Moreover, this question was not raised in the court below. The points of objection to the testimony of Mrs. Brown were stated, and this is not one of them. It would be manifestly unjust to allow this exception here, as it has no support in reality.

The refusal of Brown to sell the slave, when a good offer was made him, was evidence open to comment, but was proper for the jury, on the question whether or not the slave was sound at that time. Not that Brown would have sold the slave, had he been unsound, but to show his conduct when the offer was made.

2. The case of *Wade v. Scott*, 7 Mo. Rep. 509, shows, independently of the statute, that the breach of warranty of soundness of the slave is a defence to the note on which this suit was brought. The plaintiff, by failing to join the principal or his representative in the suit, cannot deprive the surety of the benefit of a defence, to which he is entitled by the nature of the contract and circumstances in proof. Nor is it an objection to the defence, that the warranty was made to Brown alone. The warranty was a part of the consideration of the note, and in a suit against any party to it, he may show its breach in reduction of the sum sought to be recovered.

The other Judges concurring, the judgment will be reversed and the case remanded.

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WILBURN'S ADMINISTRATOR, Appellant, vs. HALL, Respondent.

1. To authenticate a record of a court of another state, under the act of congress of May 26, 1790, the certificate of the judge must state that *the attestation of the clerk is in due form.*

*Appeal from Jackson Circuit Court.*

Plaintiff, as administrator, &c., sued defendant in the Jackson Circuit Court, on a note executed by defendant to the



deceased, for \$1522 50, dated August 1st, 1845, and payable three years thereafter.

Defendant admitted the execution of the note, but denied plaintiff's title to the note, alleging that the deceased died in Dallas county, Texas; that Robert Wilburn obtained letters of administration from the County Court of Dallas county, Texas; and that, as such administrator, said Robert Wilburn transferred the note sued upon, by assignment, in writing, to one John McCarty.

The trial of the cause was submitted to the court. The plaintiff read in evidence the note sued upon; letters of administration to John Smyth upon the estate of said Edward, from the Jackson County Court, and also letters of administration to plaintiff. The death of Smyth was admitted to have occurred before the grant of letters to plaintiff.

The defendant offered in evidence papers filed as exhibits A. and B., in a suit which was taken from the Jackson Circuit Court to the Supreme Court, in which John McCarty was plaintiff, and the defendant in this case was also defendant in that. Paper A. purports to be a copy of the order of the Probate Court of Dallas county, Texas, granting letters to Robert Wilburn upon the estate of the said Edward, and also a copy of the letters. Paper B. purports to be a written assignment by Robert Wilburn, as administrator, of a note answering the description of the note sued upon, to John McCarty, in satisfaction of his wife's distributive portion in the estate of her father, the said Edward. This appears to have been sworn to by Robert Wilburn, before the clerk of the County Court of Dallas county, Texas. Plaintiff objected to their reception in evidence.

Defendant then introduced plaintiff as a witness, who was required to answer all questions, subject to all legal objections. The plaintiff testified that the note sued upon in the case of *McCarty v. Hall*, which went to the Supreme Court from this court, was the same note sued upon in this suit; that McCarty and wife executed a power of attorney to witness, to receive

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a note from Robert Wilburn, upon defendant, for the sum of \$1500, in satisfaction of Mrs. McCarty's interest in her father's estate ; that the note was sent by letter from Texas to witness, and that this was the note received ; that after witness had received the note, he wrote the paper marked B., except the signature, date, and some other blanks, and sent it by mail to Texas, to be executed by Robert Wilburn, and that it was returned to witness in its present condition ; that witness caused said suit of *John McCarty v. Jacob Hall*, to be brought ; that he caused said papers, marked A. and B., to be filed in that cause ; that McCarty had no knowledge of the execution of the paper B. ; that McCarty has never revoked the power of attorney to witness to his knowledge ; that witness intends to pursue the law as administrator, but if he can find any authority for it, he intends, when collected, to appropriate the money now sued for, to John McCarty and wife.

Plaintiff objected to the introduction of paper A., because not properly authenticated ; also, because the letters were defective on their face ; also, because the issue presented by the answer was immaterial, and paper A. was immaterial and irrelevant.

Plaintiff objected to the introduction of paper B., because it was not filed in this cause, as required by the statute to prove assignments by affidavit ; because the assignment was not endorsed upon the note ; because the execution of B. was not proved ; also, because the issue presented by the answer was immaterial.

The court excluded papers A. and B., to which defendant excepted.

No further evidence being offered by either side, the court found for plaintiff.

Defendant then filed his motion for a new trial, which being overruled by the court, defendant excepted, filed his bill of exceptions and brings the cause up by appeal.

*Sheley*, for appellant.

1. The administrator, appointed in pursuance to the law of

a sister state, is fully authorized to sue in this, or to assign a note due his intestate, and the assignee is authorized to sue. *Harper v. Butler*, 2 Pet. Rep. 240. *Trecothick v. Austin*, 4 Mason's Rep. 16. *Glassell's Administrator v. Wilson's Administrator*, 4 Wash. C. C. Rep. 59. Kirby's Rep. (Conn.) 270. *Leake v. Gilchrist*, 2 Dev. 73—synopsis found in Sup. to U. S. Digest, vol. 1, p. 831.

2. The court erred in excluding the papers as they were filed in the office by the real party in interest, and also in treating the answer of Hall as presenting an immaterial issue.

3. The suit ought to have been brought in the name of McCarty, he being the real party in interest. Sec. 1, Art. 3 of the present practice act.

*S. L. Leonard*, for respondent.

1. The defendant has failed to make a case, containing so much of the evidence as may be material to the questions, for a new trial, as required by the new practice act. *Skinner v. Ellington*, 15 Mo. 488.

2. The court properly excluded paper A. Act congress, May 26th, 1790. 13 Mo. 203. 1 Greenl. Ev. 506; and paper B., acts 1847, p. 109, sec. 1. Rev. Stat. 190, sec. 2.

3. The defence set up by defendant is immaterial, and he is estopped from asserting it, the former suit having been based upon the ground defendant now contends for, and he having defeated it by the same position on which this suit is based. *McCarty v. Hall*, 13 Mo. 480.

RYLAND, Judge, delivered the opinion of the court.

The questions arising in this case, involve the propriety of the decision of the court below, in rejecting the paper A., being a transcript from the records of the Probate Court of Dallas county, in the State of Texas; also, in rejecting the paper B., purporting to be an assignment of a note, by Robt. Wilburn, administrator of the estate of Edward Wilburn, deceased, to one John McCarty.

The defence set up by the defendant in his answer, depending, mainly, upon the existence of facts, which these papers

were offered to establish, upon the rejection of them, had nothing to sustain it. It becomes necessary, then, to consider the act of the court in excluding these papers, with a view of its importance to the rights of the litigants.

1. The paper marked A., which the defendant offered, and which was rejected, purported to be a transcript of the record of certain proceedings in the Probate Court of Dallas county, in the State of Texas. This transcript was, in the opinion of this court, properly excluded as evidence, because it was not legally authenticated under the act of congress. The certificate of the Chief Justice and Judge of County Court within and for the county of Dallas, and State of Texas, "is defective in an important particular; it omits to contain the averment that the attestation of the clerk, who certifies the transcript of the record, is in due form." See *Duvall v. Ellis*, 13 Mo. Rep., 203.

The rejection of this paper necessarily produced the rejection of the paper B. There is, then, no error in the act of the court in thus excluding these papers.

The defendant relied upon the fact, that, although these papers were not properly authenticated, so as to be evidence of themselves, yet, as they had been filed by John McCarty's counsel among the papers and records of the suit brought by him upon the same note on which this suit is founded, against the same defendant, the defendant now had a right to use them as evidence against the present plaintiff. We see no force in this position. If the defendant in the McCarty suit, failed to avail himself of what was a fatal objection to the introduction of the paper A. in evidence in that action, it was at his own option; he had his object in view, and in all probability he turned it to his own advantage. But this by no means authorizes him now to read this very paper with its imperfect authentication, or rather without any authentication, in the present action, wherein a totally different plaintiff appears upon the record. In every view of the case, then, there is no error in refusing permission to defendant to read these papers.

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How v. Sims.

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The question then, about the right of an administrator of an estate in another state, to assign or transfer a promissory note, so as to authorize the assignee to sue in this state, in his own name, is not varied by the record of this case, and is not now before this court. The answer of the defendant admits the making of the note and mortgage sued on in this case, and does not pretend that the debt has been paid. It is the opinion of this court that the judgment of the court below should be affirmed, with damages, at the rate of ten per cent. thereon.

The judgment below is accordingly affirmed, with ten per cent. damages—the other Judges concurring herein.

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How vs. SIMS.

*Appeal from Crawford Circuit Court.*

*A. Leonard*, for appellant.

*Gardenhire*, for respondent.

RYLAND, Judge. In looking over the record of the proceedings of the court below, in this case, we find no exceptions taken to the giving of any instructions for either party, or to the refusal to give any instructions for either party. There is something said about objecting to the giving of some evidence, but nothing in that particular properly saved, as appears by the record.

The plaintiff objects to the instructions given for defendant, for the first time, when he makes his motion for a new trial, and then only does he state his objections.

This case, then, presents nothing for our consideration, and the judgment below will be affirmed—the other Judges concurring.

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Rogers v. Penniston.

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ROGERS, Respondent, *vs.* PENNISTON, Appellant.

1. One tenant in common may sue another under the new code of Practice of 1849, without resorting to the action of account under the statute of 1845.
2. A. and B. own a ferry in common, with an agreement that each shall be entitled to one half of the proceeds, after paying all expenses. B., in good faith and for a valuable consideration, leases the ferry out to C. without the consent of A. *Held*, A. cannot recover of B. one half of the proceeds received by C. but only one half of the rent reserved by B.

*Appeal from Daviess Circuit Court.**Hayden*, for appellant.

RYLAND, Judge, delivered the opinion of the court.

The parties in this suit were owners of a tract of land on Grand River, in Daviess county, as tenants in common, on which they established a ferry, some time in the year 1842 or 1843.

It appears from the evidence, that for the year 1846, the appellant, Penniston, leased the ferry to one Joseph Nichols; that Nichols was to pay to appellant and to Rogers, the plaintiff below, each one-third of the proceeds of the ferry, and to have one-third himself; that in 1847, Rogers leased the ferry to Nichols, upon the same terms; that the defendant first leased it to Nichols, in 1846, without the consent of the plaintiff, and that in 1847, the plaintiff leased it without the consent of defendant; that each one claimed the authority to rent it out, and each exercised the authority; that the said defendant kept the ferry himself in the year 1848, but owing to the low stage of the river, it did not pay the expenses of keeping that year; that the proceeds of the ferry, in 1846, were about one hundred and fifty dollars, which the lessee accounted for, according to his contract; that the proceeds of it, in 1847, were fifteen dollars; and that in 1848, the proceeds of the ferry were not sufficient to pay the expenses in keeping it up; that in the breaking up of the winter, in February, 1849, the ice carried off the ferry boat, and that there was no boat at the ferry until about the last of March, 1849; that the defendant



below, the appellant here, leased the ferry for the year 1849, to one Theodore Penniston, for and in consideration that the lessee should build and put in a new ferry boat and leave it at the end of the season for the said ferry. Accordingly, Theodore Penniston built and put at the ferry a boat, about the 27th of March, 1849, which he left there; that, owing to the unprecedented emigration to California, in the spring of 1849, the proceeds of the ferry were between four and five hundred dollars, during the ferrying season of that year. At the time of the leasing of the ferry to Theodore Penniston, there was no expectation of such an amount of traveling as afterwards took place; that the boat was left at the ferry by Theodore Penniston, after the expiration of his lease; and that he paid none of the proceeds to the appellant. The ferry boat was worth from forty-five to fifty dollars. The plaintiff's action was to recover one half of the proceeds of the ferry for the year 1849, from the defendant. It was admitted, on the trial, that the proceeds of the ferry, after paying all expenses, were to be divided equally between the parties. On the trial several instructions were asked by both parties, which the court refused to give. The court, of its own motion, gave two instructions. These two instructions, given by the court to the jury, and two others asked by the defendant below, which the court refused to give, involve the main points of controversy in this case.

The instructions asked and refused are as follows:

1. If the jury find from the testimony, that the plaintiff and defendant were tenants in common in the land on which the ferry in controversy was situated, and that defendant in good faith, and for a valuable consideration, leased said ferry for a limited time, and that the proceeds of said ferry, so leased or rented, were applied to the equal and joint benefit of plaintiff and defendant, that then, for the proceeds and profits of said ferry, for the time it was so rented or leased, the plaintiff has no right to recover in this action.
2. If the jury believe from the evidence, that defendant

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Rogers v. Penniston.

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was a partner with the plaintiff in said ferry; that the defendant rented said ferry out for a limited time, in good faith, and for a valuable consideration, and that the proceeds and profits of said ferry were applied to the joint and equal benefit of both parties, that then the plaintiff is not entitled to recover.

The instructions which were given are as follows:

1. If the jury find from the evidence, that there was a contract existing between plaintiff and defendant, by which the proceeds of the ferry, after deducting the expenses of keeping the same, were to be divided equally between them, then the jury will find for the plaintiff one half of the proceeds of the ferry, after deducting the costs of repairing the boat, and a reasonable allowance for keeping the ferry; and in making the estimate, they will include the proceeds of the ferry during the time the same was rented to Theodore Penniston, unless they find that the plaintiff assented to the renting to Theodore Penniston, or that such renting was in accordance with the usual course of business by the parties before that time.

2. If they find from the evidence, that there was no contract in reference to the division of the proceeds of the ferry, and that the defendant, either with the assent of the plaintiff, or in accordance with the usual course of business by them before that time, rented the same to Theodore Penniston, in good faith, stipulating that the rent should be paid by a boat built for their joint benefit, and the said boat was built accordingly, and that the defendant did not receive any other proceeds of such ferry, they will find for the defendant.

The jury found for the plaintiff, and assessed his damages at one hundred and twenty dollars. The defendant below filed his motions for a new trial and in arrest of judgment, which being overruled, he brings the case here by appeal.

1. Upon the facts as set forth in this case, it is the opinion of this court that the court below erred in giving the instructions, and also in refusing the instructions above set forth. It is

not deemed necessary to review the old law upon the rights and privileges of tenants in common, whether and in what mode one can sue the other for the rents and profits of the estate held in common. By the statute concerning "Practice in Courts of Justice," passed in 1849, and under which this present action was brought, the distinction between different actions at law, and between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished. This act declares that "all rights of action, given or secured by existing laws, may be prosecuted in the manner provided by it." It was not necessary, therefore, for the plaintiff to resort to the action of account under our statute of 1845, as contended for by one of the counsel in his brief.

2. The defendant below having leased out the ferry for the year 1849, for and in consideration of a ferry boat, to be built and used at the ferry, and to be left there for the ferry, it was proper and right that this contract of the defendant should be brought before the jury, for them to ascertain if such renting was made in good faith, and with *bona fide* intention, or otherwise; and whether the consideration of the renting for the year 1849, was a valuable one, and equally for the benefit of both parties or not. The instructions given by the court are improper in placing the liability of the defendant below upon the existence of a contract between the plaintiff and defendant, by which the proceeds of the ferry, after deducting expenses of keeping the same, were to be equally divided between them. This instruction did not put the case properly before the jury. The defendant contended that he was not liable, because he had, in good faith, rented the ferry for a boat, which was for the joint benefit of himself and plaintiff, and was a valuable consideration at the time of making the lease; and that he had received nothing but the boat, which was to be used at the ferry, and was the joint property of both. The instructions given were erroneous, and the two inserted above, as asked by the defendant, should have been

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Pitcher v. Hovey.

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given. If the renting by the defendant to Theodore Penniston was a mere collusion, or if there was an understanding that the defendant was to receive a part of the proceeds above the ferry boat, these instructions were calculated to bring the honesty and good faith of the transaction between defendant and Theodore Penniston before the jury. The liability of the defendant to his co-tenant in common did not depend upon any contract about dividing the profits of the ferry. If the defendant, as co-tenant in common, had received nothing from his renting out the ferry but the ferry boat, which was for the joint interest of plaintiff and defendant, a contract about dividing profits could not make him liable. The ferry boat was the proceeds of the ferry for the year 1849. It yielded nothing above the expenses in 1848, according to the evidence of Nichols, and there was nothing for such a contract to operate upon.

The judgment below must be reversed and the cause remanded—the other Judges concurring.

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PITCHER, Defendant in Error. *vs.* HOVEY, Plaintiff in Error.

*Hovey v. Pitcher*, 13 Mo. Rep. 191, affirmed.

*Error to Jackson Circuit Court.*

*Hovey*, for plaintiff in error.

*Hicks*, for defendant in error.

GAMBLE, Judge. When this case was before this court upon a former occasion, a full statement of the contract of the parties was made, which it is not necessary here to repeat. Reference is made to the report of the case as formerly before this court. 13 Mo. Rep. 191. The contract then received a construction, which we will not disturb. The judgment of the Circuit Court was then reversed, and the cause remanded for a new trial, and the present record presents the result of the second trial.

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Powers v. Blakey's Administrators.

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The instructions which were given at the instance of the plaintiff are warranted by the opinion given when the former judgment was reversed ; and those asked by defendant, Hovey, which now appear to have been refused, were calculated, if given, to mislead the jury. It is not thought necessary to examine these instructions in detail, and point to the objectionable portions of each, because an opinion, stating the particulars in which they depart from the proper construction of the contract, would furnish no rule for the decision of other cases, on other contracts.

The judgment of the Circuit Court is, with the concurrence of the other Judges, affirmed.

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POWERS, Plaintiff in Error, *vs.* BLAKEY'S ADMINISTRATORS,  
Defendants in Error.

1. Under sections 9, 10 and 11 of article 2 of the act concerning administration, (R. S. 1845,) a creditor of an estate cannot maintain an action in the County Court against the administrator for concealing or embezzling property of the estate.
2. Although the County Court has exclusive original jurisdiction of controversies respecting the duties of administrators, yet that jurisdiction can only be exercised in the manner prescribed by statute.
3. To give the County Court jurisdiction of a proceeding by a creditor against an administrator, for waste, under sections 1, 2, 3 and 4 of article 7 of the act concerning administration, (R. S. 1845,) it must appear that there is an insufficiency of assets returned by the administrator to pay all demands allowed against the estate.

*Error to Morgan Circuit Court.*

*Hayden*, for plaintiff in error.

It was competent for the County Court to entertain jurisdiction of the complaint against the defendants, as made by the plaintiff, Powers. Rev. Stat. 1845, tit. Courts, p. 331, 332, sections 13, 14. *Ib.* tit. Administration, sections 2, 4, 5, 9, 10, 11 and 45. Art. 7, same title and book, section 9, p. 105. Eng. Ecc. Rep. vol. 1, 78, 79, 81, 82. 15 Mo. Rep. 313, 314 and 315, *Overton v. McFarland*.

*Gardenhire*, for defendants in error.

The court below did right in dismissing the cause.

The affidavit and proceedings against the defendants are based upon the ninth, tenth, eleventh and twelfth sections of the second article of the administration act. These provisions contemplate proceedings *by* administrators, and not *against* them. They are intended to aid administrators in collecting estates, not to coerce them to inventory and account for them.

A County Court has no power to compel an administrator to inventory and account for property. It is not for the County Court to determine what property belongs to an estate. This must be determined by an administrator, under his official oath and bond. If his determination be wrong, he is liable only upon his oath and bond. The County Court cannot arbitrarily force him to inventory property which he may not believe belongs to the estate, and swear to an inventory made out, not by himself, but by the court.

GAMBLE, Judge, delivered the opinion of the court.

1. The proceeding instituted in the County Court, by Powers against McElwrath and Blakey, who are administrators of Blakey, deceased, is founded upon a misconception of the meaning of sections 9, 10 and 11 of the second article of the act concerning administrators, Rev. Code, 74. These sections authorize an executor or administrator, or other person interested in an estate, to proceed in the county court against any person who has concealed or embezzled any of the effects of the deceased, and authorize the County Court to compel the appearance of the party charged, and to hear and determine the complaint. The eleventh section provides for a trial, when the person charged "denies the right of the executor or administrator" to the property alleged to be concealed or embezzled, and directs a judgment to be rendered "according to right." Powers attempted to use the proceeding under these sections, against the administrators themselves, alleging that they had embezzled several slaves of the intestate, and had



failed to inventory them, and that he was a creditor of the estate. The County Court not only entertained jurisdiction of the proceeding, but gave judgment that the administrators should make and file an inventory of the slaves within ten days. The case was taken to the Circuit Court by appeal, and the proceeding dismissed for want of jurisdiction in the County Court. It comes here for a review of the action of the Circuit Court.

There can be no doubt that the sections of the statute before mentioned contemplate a proceeding, by which property of a deceased person shall be taken from the hands of one who has concealed or embezzled it, and be put into the hands of the executor or administrator, and the language of the sections, as well as the object of the proceedings, forbid the idea that it can be employed against the administrator himself.

2. The position has been assumed that the County Court, under the thirteenth section of the act establishing courts, Rev. Code, 331, has the exclusive original jurisdiction "to hear and determine all disputes and controversies respecting the duties of executors, administrators or guardians;" and, under the fourteenth section of the same act, has the power to cause to come before it all persons, who, as executors, administrators, guardians, or otherwise, may be accountable for any lands, tenements, goods or chattels belonging to the estate of any deceased person, and may examine every person, on oath or affirmation, touching any matter of controversy, before it; and that these sections authorize the proceeding in this case. It may be admitted that the exclusive original jurisdiction of controversies, respecting the duties of administrators, is vested by the thirteenth section, in the County Courts. In fact, it has been so decided by this court. But the mode of exercising that jurisdiction is not left to the discretion of those courts, to be applied in such cases as they may think proper. It is a jurisdiction to be exercised under the direction of the law. The duties of an executor or administrator are very numerous and varied, extending from the time the letters are granted to

the final settlement of the estate, and provision is expressly made in the statute for compelling the performance of some of them. The County Court is directed "to examine inventories, appraisements and sale bills filed since their last term, to see if they have been made and filed according to law, and to issue citations to compel all delinquents to comply with the law." Rev. Code, 79, section 45. The court may compel the settlement of accounts and the performance of many other duties, under the direction of the provisions of the statute; and under the thirty-third section of the Revised Code, page 67, an executor or administrator, "who has become incapable or unsuitable to execute the trust reposed in him, or who has failed to discharge his official duties," may be removed by the revocation of his letters in the mode prescribed in that section. But there is no section of the act which authorizes the County Court to proceed against an administrator, upon a charge of embezzling property belonging to the estate, made as this charge was. There is an entire article of the statute, (the seventh,) which regulates proceedings against executors, administrators and their securities, as well in the County as in the Circuit Court, but the present proceeding is not under that article. In the exercise, then, of the general jurisdiction conferred by the thirteenth section of the act establishing courts, the County Court is to be governed by law, and the law must prescribe the mode of its exercise. It is supposed that the case of *Overton v. McFarland*, 15 Mo. Rep. 313, is an authority for the exercise of the jurisdiction here claimed, and for the mode of proceeding here adopted. In that case, a creditor of an estate commenced a proceeding in the Circuit Court, in the nature of a bill in chancery, against the administrator of the estate, alleging the failure of the administrator to inventory certain slaves, and praying that he be compelled to return them as the property of the intestate, and administer them as such. The question decided in that case is, that the Circuit Court had not jurisdiction, and could not give the relief sought. The language employed is this: "Here

the administration is still in progress in the County Court, and that court is competent to hear and determine the controversy respecting the duty of the administrator in relation to the property mentioned in the petition, and has exclusive original jurisdiction of such question." It is obvious that this language applies only to the question of jurisdiction, and gives no intimation as to the mode in which it is to be exercised. The grant to the County Courts of exclusive original jurisdiction of any subject, will deprive other courts of original jurisdiction over that subject, although the mode in which the County Courts are to exercise the jurisdiction may be difficult or circuitous. Although the relief sought in *Overton v. McFarland* was precisely that sought here, and although it was decided that the Circuit Court had not original jurisdiction of the controversy, and that the County Court had such jurisdiction, yet the mode in which the County Court is to exercise the jurisdiction is to be sought in the statute conferring powers upon that court.

3. In the present case, a creditor endeavors to obtain from the County Court an order requiring the administrator to return certain slaves as the property of the intestate and administer them as such. A creditor is entitled to have his demand paid if there be sufficient assets, and there his interest in the estate ends. He is entitled to have the administrator removed for unfitness to discharge his duties, or for failure to discharge them. After a settlement by the administrator, in which the assets appear to be insufficient to pay the debts, a creditor is entitled to suggest that the administrator has not made a just account of the assets in his hands, and upon establishing the fact, to recover judgment against him for the amount wasted. Art. 7, sections 1, 2 and 3. Although it is alleged by the present party that he is a creditor of the estate, it does not appear that there is any insufficiency of assets returned by the administrator to pay his and all other debts.

No clause is found in the statute, authorizing the application

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made by this creditor, and, therefore, the proceeding was rightly dismissed by the Circuit Court.

The judgment, with the concurrence of the other Judges, is affirmed.

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CONNETT, Appellant, vs. HAMILTON, Respondent.

1. An action under the seventh section of the act concerning witnesses, (R. S. 1845,) against a person for failing to attend as a witness, when duly summoned, &c., may be begun before the determination of the suit.
2. In such a case, a transcript of the subpoena served on the party, and of the record of a part of the proceedings in the case, is admissible evidence, although the full record is not offered.

*Appeal from Buchanan Circuit Court.*

*Loan*, for appellant.

The transcript of the record of the subpoena, issued from the office of the clerk of the Clinton Circuit Court, and which was served on the defendant, James Hamilton, was legal and competent, and tended to prove, in part, matters material to the issue before the jury.

RYLAND, Judge, delivered the opinion of the court.

The facts of this case appear from the record, as follows :

William C. Connett, the appellant, commenced his action before a justice of the peace, on an account, the statement of which, as filed with the justice, is as follows :

“ Mr. James F. Hamilton,

“ To William C. Connett, Dr.

“ For twenty-four dollars and ninety-five cents that Connett was compelled to pay for costs adjudged against him by the Clinton Circuit Court at the April term thereof, 1850, in the case of William C. Connett v. Levi Judah, upon his (Connett's) application for a continuance of said cause, which said application was made by reason of the said Hamilton's failure to attend the trial of said cause, and to bring with him

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a certain deed, after having been duly subpoenaed so to do, and  
 after having his legal fees therefor paid to him, - \$24 95  
 Also, for the sum of four dollars and fifty cents fees  
 paid to said Hamilton as a witness in the case of  
 Connett v. Judah, after having been duly subpoenaed,  
 and before the day set for trial, and wherein you  
 failed to obey the requisitions of the subpoena, 4 50  
 "For damages sustained by reason of your failure as  
 aforesaid, - - - - - 20 00

"Amount claimed, - - - - - \$49 45

"WILLIAM C. CONNETT."

Judgment was rendered by the justice in favor of Hamilton.

Connett appealed, and on the trial in the Circuit Court, he  
 offered to read in evidence, as a part of his testimony, the fol-  
 lowing transcript :

STATE OF MISSOURI, }  
 County of Clinton, } ss.

Be it remembered, that on the 28th day of February, A. D.  
 1850, there issued out of the office of the Circuit Court, within  
 and for the county of Clinton, aforesaid, in the case of Wil-  
 liam C. Connett against Levi Judah, then pending in said  
 court, a *subpœna duces tecum*, in the words and figures fol-  
 lowing, to-wit :

The State of Missouri,

To James Hamilton :

You are hereby commanded, that, all excuses and delays  
 being laid aside, you be and appear before the Judge of our  
 Clinton Circuit Court, at the court house in the town of  
 Plattsburg, on the 17th day of April, A. D. 1850, it being  
 the third day of the next term of said court, and that you  
 bring with you and produce at the time and place aforesaid, a  
 certain warranty deed, executed by Jacob Reece and Elizabeth  
 Reece, and conveying to James Hamilton the north half of  
 the south-east quarter of section number thirteen, in township  
 number fifty-five, of range number thirty-six, in Buchanan

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county, in the State of Missouri, bearing date on the 26th day of August, 1847, and then and there to testify and show, all and singular, those things which you know or the said deed doth import, of and concerning a matter of controversy in said court depending, between William C. Connett, plaintiff, and Levi Judah, defendant, on the part of the plaintiff: hereof fail not at your peril.

Witness, Winslow Turner, clerk of our said court, with the  
 { L. S. } seal thereof affixed, at Plattsburg, this twenty-eighth  
 day of February, A. D. eighteen hundred and fifty.

WINSLOW TURNER, Clerk.

On which said subpoena is the following return by the sheriff, to-wit :

I served the within subpoena by reading the same to James F. Hamilton, on the 8th day of April, 1850 ; said Hamilton demanded his fees in advance, which were not paid by me.

WILLIAM W. REYNOLDS,  
 Sheriff of Buchanan county.

And, afterwards, to-wit, at a term of said court, begun and held at the court house, in the town of Plattsburg, on the 15th day of April, A. D. 1850, among other were the following proceedings, to-wit :

TUESDAY, April 16th, 1850.

William C. Connett, }  
                   vs.        } Trespass.  
       Levi Judah.        }

By consent and agreement of the said plaintiff, it is ordered by the court that the costs of the attachment ordered against Edward A. Beauchamp, for not attending as a witness in this cause, be taxed against the said plaintiff ; and it is further ordered, that the said attachment be dismissed.

WEDNESDAY, 17th, 1850.

William C. Connett, }  
                   vs.        } Trespass.  
       Levi Judah.        }

And now here come the said parties by their attorneys, and,



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on motion of the said plaintiff, it is ordered that this cause be continued until the next term of this court, and that the said plaintiff pay the costs of the present term of this court.

STATE OF MISSOURI, }  
County of Clinton, } ss.

I, Winslow Turner, clerk of the Circuit Court, within and for the county aforesaid, do hereby certify that the foregoing two pages contain true copies of the subpoena to James Hamilton, issued in the case of William C. Connett against Levi Judah, and of the sheriff's return thereon; and also, of all the entries made in said case, at the April term, 1850, of said court.

In testimony whereof, I hereunto set my hand and affix the  
{ L. S. } seal of said court, at Plattsburg, this ninth day of  
January, A. D. eighteen hundred and fifty-one.  
WINSLOW TURNER, Clerk.

William C. Connett, }  
vs. } *In the Clinton Circuit Court.*  
Levi Judah. }

Bill of the costs in the above entitled cause, adjudged against the said William C. Connett, at the April term, 1850, of the Clinton Circuit Court:

To William W. Reynolds, sheriff:

For serving subpoenas on six witnesses, at 50 cents, \$3 00

To John Steel, sheriff:

For calling cause and parties, - - - - 30

To Jacob Reece, witness:

For one day's attendance and thirty-six miles travel, 2 80

To Benjamin McCray, witness:

For one day's attendance and forty miles travel, - 3 00

To Isaac Lower, witness:

For one day's attendance, and sixty miles travel, - 4 00

To James Isaacs, witness:

For one day's attendance and sixty-four miles travel, 4 20

Amount carried forward, \$17 30

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 Connett v. Hamilton.
 

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Amount brought forward, \$17 30

To James F. Hamilton, witness :

For one day's attendance and sixty miles travel, - 4 00

To Winslow Turner, clerk :

For six subpoenas, at 50 cents, - \$3 00

For filing four subpoenas, - - 20

For appearances, - - - 20

For continuance, - - - 25

3 65

Costs of the attachment against E. A. Beauchamp, 2 75

\$27 70

 STATE OF MISSOURI, }  
 County of Clinton, } ss.

I, Winslow Turner, clerk of the Circuit Court, within and for the county aforesaid, do hereby certify that the foregoing is a true and correct taxation of the costs adjudged against William C. Connett, at the April term, 1850, of said court, in the case wherein said William C. Connett was plaintiff, and Levi Judah was defendant, and that the said William C. Connett has paid said costs.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Plattsburg, this ninth day of January, eighteen hundred and fifty-one.

WINSLOW TURNER, Clerk.

Clerk's cost, 75 cents.

To the reading of which the defendant objected. The court sustained the objection and excluded the transcript. The plaintiff excepted to the opinion of the court. He afterwards took a non-suit, with leave to move to set the same aside. He afterwards and in due time filed a motion to set aside the non-suit and for a new trial, and therein he assigned the following reasons as cause therefor.

1. The court improperly excluded the transcript from the Circuit Court records of Clinton county, which was offered in evidence by the plaintiff.

2. Said transcript should have been allowed to go to the jury, but was improperly excluded by the court. The court overruled said motion. The plaintiff excepted and tendered to the court a bill of his said several exceptions, and he now brings said cause into this court by appeal, and has assigned for errors the said several opinions of the court below to which he had excepted.

The question before this court involves the propriety of the action of the Circuit Court in excluding and rejecting the evidence offered by the plaintiff below.

In the opinion of this court, the transcript should have been admitted; it was proper evidence to prove that a subpoena had been issued and served on the defendant. The evidence, so far as the subpoena is mentioned, was material and relevant, and ought to have been allowed.

It is our opinion that the properly authenticated copy of a subpoena, issued by a clerk in a suit, is evidence in some cases, and for some purposes, to prove that there was such a suit.

But should the party wish to show what the action was brought for, or what was determined by the court in the suit, or where the original suit becomes the foundation of a subsequent action, there the full record must be offered, and not an extract of it.

1. But in this case, long before the original suit may be determined, for aught we know, the plaintiff here, having caused a subpoena to be issued and served on a witness, who has failed or neglected to attend and obey its mandate, may surely sue such witness, without waiting for a determination of the suit, so as to get a full and complete transcript of the whole case, and on such suit, the subpoena, properly authenticated, would be evidence, and should be admitted, otherwise no action can be maintained by either one of the parties to a suit against a witness who wilfully or negligently causes material injury to him. The right of action against the witness is complete whenever he fails to attend, being properly subpoenaed, and his fees, &c., tendered to him, and such failure has been productive of

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State v. Fleetwood.

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damages to the party subpoenaing him, and this right may be enforced by action before the determination of the suit wherein witness was summoned to attend.

2. The Circuit Court erred, therefore, in rejecting the evidence offered by the plaintiff below. The other Judges concurring, the judgment is reversed and cause remanded.

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THE STATE vs. FLEETWOOD.

1. An indictment under section 43 of article 8 of the act of 1845, concerning "Crimes and Punishments," which substantially pursues the words of the statute, is sufficient. Matter of aggravation in a count will not vitiate it.
2. A count which charges that the defendant ran a horse upon the highway, &c., "so as to interrupt travelers," instead of "so as to interrupt travelers thereon," is bad.

*Appeal from Ozark Circuit Court.*

*Gardenhire*, attorney general, for the State.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted by the grand jury of Ozark county, at the October term, 1851, of the Circuit Court for that county, for a violation of the forty-third section of article eighth of the criminal code. He appeared to the indictment and moved the court to quash the same, which motion is as follows :

The defendant moves the court to quash the indictment in this cause, for the following reasons : *First*, because there is a misjoinder of offences ; *second*, there is a want of venue in each count of said indictment ; *third*, the court will quash the first, second and fourth counts, because they are double, and venue is not definitively laid, and the third for want of venue.

The court sustained the motion, and quashed the indictment. The circuit attorney excepted to the decision of the court, and brings the case here by appeal.

The indictment is as follows :

“The grand jurors for the State of Missouri, empaneled, sworn and charged to enquire in and for the county of Ozark, in the State of Missouri, upon their oath present, that Isaac Fleetwood, jr., late of the county of Ozark, in the State of Missouri, on the nineteenth day of September, in the year of our Lord eighteen hundred and fifty-one, with force and arms, at Ozark county, aforesaid, then and there did run upon a public road, in common use, in the county of Ozark, and State of Missouri, a horse, so as to interrupt travelers, and did then and there run said horse at and against one Elvira Martin, then and there being, thereby greatly hurting and interrupting the said Elvira Martin, then and there being, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

“And the grand jurors aforesaid, upon their oath aforesaid, do further present that Isaac Fleetwood, jr., late of the county of Ozark, aforesaid, with force and arms, at Ozark county, in the State of Missouri, on the nineteenth day of September, in the year of our Lord eighteen hundred and fifty-one, did then and there run upon a public road and highway, in common use in this state, a horse, so as to interrupt travelers thereon, and put to fright horses and other animals by them rode and driven, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

“And the grand jurors aforesaid, empaneled, sworn and charged as aforesaid, upon their oath as aforesaid, do further present that Isaac Fleetwood, jr., late of Ozark county, in the State of Missouri, aforesaid, with force and arms, at the said county of Ozark, on the nineteenth day of September, in the year of our Lord eighteen hundred and fifty-one, did then and there run upon a public highway, in common use in Ozark county, in the State of Missouri, a horse, so as to interrupt travelers thereon, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

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Denny v. Kile et al.

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"And the grand jurors aforesaid, empannelled, sworn and charged as aforesaid, upon their oath aforesaid, do further present, that Isaac Fleetwood, jr., late of Ozark county, in the State of Missouri, with force and arms, at Ozark county, aforesaid, on the nineteenth day of September, A. D. eighteen hundred and fifty-one, did then and there run upon a public road and highway, in common use in the county of Ozark and State of Missouri, a horse, so as to interrupt travelers thereon, by means of which said running the horse as aforesaid, he, the said Fleetwood, then and there greatly interrupted and injured one Elvira Martin, then and there being, and other wrongs to the said Elvira Martin then and there did, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

By reference to the statute aforesaid, it will be seen "that if any person shall run or cause to be run upon any public road or highway, in common use, in this state, any horse or horses, so as to interrupt travelers thereon, or put to fright the horses," &c.

1. In this case, the indictment substantially pursues the words of the statute in describing the offence. The aggravation of running against the lady therein mentioned, does not vitiate it.

2. The three last counts we consider good, but the first count is insufficient. It neglects to aver that the running was done so as to interrupt travelers thereon. In this view of the law, the Circuit Court erred in quashing the indictment.

The other Judges concurring, the judgment of the court below is reversed, and the cause remanded.

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DENNY, Appellant *vs.* KILE *et al.*, Respondents.

1. Where A. contracts to do work under the control and direction of B., he is not responsible for want of skill, unless he fails to comply with B.'s directions.
2. A party can maintain no action on a contract which he procures by fraud.



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Denny v. Kile et al.

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3. By the terms of a contract sued on, the defendants were to deliver plaintiff broom corn cleaned and baled, ready for shipping, as fast as the same could be prepared by them; the plaintiff was to have the control and direction of the whole work. *Held*, evidence of defects in machinery furnished by plaintiff to defendants, which occasioned delay, is competent evidence for defendants, in an action for a breach of the contract.
4. A plaintiff cannot recover for the breach of a stipulation in a contract, unless he has performed all the acts on his part, which were conditions precedent, and is ready to perform those which were to be performed concurrently with the act of the defendant.

*Appeal from Saline Circuit Court.*

*Hayden*, for appellant.

The Circuit Court erred in permitting the defendants to give to the jury irrelevant and illegal testimony, particularly with reference to the unfitness and defects of the horse power furnished them by the plaintiff. 1 Saund. 320, note 4, and other notes therein referred to. 2 Bailey's Rep. 82-4, *Rice v. Sims and Worthy*. *Campbell v. Jones*, 6 T. R. 573. 1 H. Black. 273. Doug. Rep. 471. 3 Penn. Rep. *Shaw v. Turnpike Co.* p. 445. 2 Penn. Rep. 461. Story on Contracts.

*Leonard*, for respondent.

1. If the contract was obtained from the defendants by fraud, it was void. 2. The obligation of the defendants to cultivate the land, and deliver the plaintiff its produce, was not an independent covenant, but dependent on the fulfillment by the plaintiff of his obligation to furnish seed corn, planter, baling press, cylinders, and money.

3. By the express terms of the contract, it was to be performed under the direction and control of the plaintiff, and, therefore, the defendants were only bound to do the work as directed, provided the instructions were reasonable, and, in the absence of directions, if bound to act at all, they were only bound for the exertion of such skill in the business as they possessed, and not for such skill and work as, in reference to the crop, would be considered reasonable skill or farmer-like work. 4. Even if the plaintiff was under no obligation to

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Denny v. Kile et al.

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furnish a horse power, to be used in driving the machinery, yet, as the work was to be done according to his directions, and he did furnish this power to be used in that way, the defendants were at liberty to show that it was unfit for the purpose, and occasioned delay in the completion of the work, in answer to plaintiff's allegation that the work was not well done, nor completed within the time prescribed by the contract.

5. No instruction was given or refused as to the plaintiff's right of recovery independent of the special contract, and, as the evidence is not preserved, the plaintiff's right to recover on the common counts cannot appear.

GAMBLE, Judge, delivered the opinion of the court.

This was an action of assumpsit by Denny, the appellant, against G. and J. Kile, in the Saline Circuit Court, upon a written agreement, and was tried on pleas of non assumpsit and set off, at the last November term, when the defendants had a verdict and judgment.

By the agreement, the defendants were to cultivate, on their own, and their father's farms, one hundred and fifty acres, in broom corn, and deliver the brush, cleaned and baled, ready for shipment, to the plaintiff, at the defendants' drying house, as fast as it could be prepared—all to be delivered before the 20th of September, 1845; and the whole process, from the preparation of the ground to receive the seed, to the baling for shipment, to be "under the direction and control" of Denny, who was also to procure seed corn and a machine to plant it, and either to get a baling press, or a model by which to construct one, and cylinders for cleaning the brush. Denny was to pay the defendants for the brush, fifteen hundred dollars, as follows: before the time of harvesting, as much money, not exceeding five hundred dollars, as would be necessary to prepare for harvesting and saving the brush; at the time of harvesting, as much as would be necessary for saving and preparing the brush for shipment, and the balance on the delivery of the whole produce of the land. Denny

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Denny v. Kile et al.

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was not to pay for ground on which the crop might be destroyed by an overflow of the river—the whole risk from an overflow of the river resting on the defendants; and if the river should not leave ground enough to refund what Denny should advance, he was to receive this excess the next year in broom corn, at the same rate, and was to have a lien on the houses and machinery, put up to complete the contract, for the money advanced.

The bill of exceptions does not preserve the evidence, but declares that the plaintiff gave evidence conducing to establish the agreement sued on; that the plaintiff complied with his part of it by furnishing the seed planter, baling press, and cylinders, and the money he was required to advance, and that the defendants had failed to comply with their part of the contract by cultivating the required quantity of land, or doing the work in a farmerlike manner, or according to the plaintiff's instructions; and that there were about thirteen bales of brush, the produce of the land, at the defendants' drying house, which they refused to deliver to the plaintiff when demanded. The record shows that the defendants gave evidence conducing to prove the reverse of the facts set up by the plaintiff: that the agreement was obtained from them by fraud; that the defendants were farmers, and unacquainted with the cultivation or preparation of broom corn for market, and that the plaintiff was skilled in the business; that the plaintiff made to the defendants false and fraudulent representations, during the treaty for the contract, as to the number of hands necessary for the work, and the capacity of the drying house to dry out the brush; that the plaintiff failed to instruct them as to the proper mode of doing the work; that the baling press and cylinders were badly constructed, always getting out of repair, and unfit for the purpose for which they were intended; that the plaintiff furnished, with the press and cylinders, a horse power to drive the machinery, and that this horse power was badly constructed—generally out of repair, and unfit for the work; that the defendants had built

their drying house according to the plaintiff's instruction ; that it was badly constructed, and afterwards, during the season, was burned down, with the brush in it ; and that the plaintiff took the control and management of the whole business. Upon the trial, the plaintiff objected to the proof in relation to the horse power, which was overruled, and the evidence received.

1. It is apparent from the statement of the case, that Denny was to exercise a direction and control over all the acts of the defendants Kile, in the whole process of cultivating the broom corn, and harvesting and preparing the crop for market. The want of skill, if any appeared in the management of the crop by the defendants, was not a ground of complaint on the part of plaintiff, unless there was a failure to comply with his directions.

2. It is stated in the record that evidence was given of fraud practised by Denny, in procuring the contract from the defendants. This evidence rendered it necessary that the plaintiff, in every instruction he asked, which asserted his right to recover upon the special contract, should require the jury to find the contract to have been obtained in good faith. If it was procured by fraud, he could maintain no action upon it, whatever might be his right to recover the money received by the defendants.

3. As the plaintiff had the control and direction of the whole work, when he furnished to defendants machinery, such as that called the " horse power," to be employed in the preparation of the crop for market, delays in the work, occasioned by defects in that machinery, were delays occasioned by him, or to which he must be understood to have assented, and it was competent for the defendants to give evidence of such defects, as in several counts in the declaration they are charged with the breach of contract " that they did not deliver the corn cleaned and baled, ready for shipping, as fast as the same could have been prepared by them."

4. The contract between the parties contains various stipulations on each side, some on the part of the plaintiff, which

are conditions precedent to others made by defendants, some on either side which are mutual and dependent. An instruction asked by plaintiff, which asserted his right to recover upon any stipulation on the part of defendants, could not properly be given, unless it required the jury to be first satisfied of the performance by the plaintiff of all acts which, by the contract, were conditions precedent to the obligation of the defendants, or his readiness to perform those which were to be performed concurrently with the act of defendants.

It is believed that the principles here stated cover all the points raised upon the instructions asked by the plaintiff which were refused by the court. Those given at the instance of defendants are free from objection. It has been urged that, as there are common counts in the declaration, the plaintiff was entitled to recover upon them, although he may not have shown sufficient to recover on the special counts. An examination of the instructions of plaintiff, which were refused by the court, will satisfy any mind that they are directed to the special counts alone, and that, those counts being before the jury, the instructions were properly refused. The cause of action and the measure of recovery, under the special counts, were different from those under the common counts. No instruction asked and given for the defendants concluded the right of plaintiff to recover on the common counts.

It has not been thought necessary to examine separately the twenty-six instructions upon which the Circuit Court acted. Such examination could only be profitable if the case were again to be tried, or if the questions arising upon them were of general interest.

The judgment of the Circuit Court will be affirmed.

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KNOWLES, Respondent, *vs.* MERCER, Appellant.

1. The Supreme Court cannot exercise original jurisdiction by ordering a chancery case, on appeal, to be referred to a commissioner. Where the court is not satisfied from the evidence in the bill of exceptions that the decree of the court below was correct, and no

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Knowles v. Mercer.

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account was taken, so that it is impossible to state what errors were committed, the case will be reversed and remanded, with directions to the court below to have an account stated between the parties.

*Appeal from Jackson Circuit Court.*

*Sheley*, for appellant.

*Hovey*, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

Knowles filed a bill in chancery for the settlement of a partnership account between himself and the defendant, Mercer. The bill states that a partnership was formed in an adventure to Santa Fé, and proceeds to detail the terms of the agreement, and the results of the adventure, and claims that, upon a settlement, a balance is due the plaintiff. The answer admits the partnership, and the terms, as stated in the bill; gives a different detail of the transactions in the business; charges Knowles with misconduct, and claims that, upon a settlement, a balance will be found due to the defendant. A replication being filed, the case was heard by the court upon the evidence. There was no reference to a commissioner to take an account, and no account was stated by the court; but a decree for a sum of money was rendered in favor of the complainant, and certain effects of the concern were by the decree allotted to each of the partners.

1. The appeal brings the case before this court without a possibility of ascertaining upon what basis the decree was rendered. It cannot be known what items were allowed to either party upon the adjustment of the account, nor what was the result of the adventure in which they were engaged. A reference cannot be made by this court, because it would be exercising original jurisdiction, as the commissioner would be obliged to bring before him the parties and their witnesses, and state the account upon their testimony. In this condition of the case, we can only look into the record, and determine whether, from the evidence stated in the bill of exceptions, the result arrived at by the Circuit Court is satisfactory; whether,



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Boon et al. v. Miller's Executors.

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in the absence of all details, and all calculations, we believe a proper decree has been rendered. We are by no means satisfied that the decree is correct; but it is impossible to state the particulars in which any errors were committed in the court below, in the absence of the account upon which the decree was based. The appeal in chancery brings the whole case before this court upon the law and facts, and the decree to be rendered here when the whole case is properly presented, is, in general, a final decision of the cause. But in the present case no such decree can be rendered. The decree of the Circuit Court will, therefore, be reversed, and the cause remanded, with directions to that court to have an account between the parties in relation to the adventure, fully stated. It is not necessary, nor would it be proper here, to lay down the principles upon which the account is to be stated, as the Circuit Court is charged with that duty as a part of its original jurisdiction, when it refers a case to a commissioner. If the account thus stated shall be unsatisfactory to either of the parties, and exceptions be taken to it, the questions may be preserved so as to be reviewed by this court, and when the decree is rendered, it will appear what items have been sanctioned by the court.

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BOON *et al.*, Plaintiffs in Error, *vs.* MILLER'S EXECUTORS,  
Defendants in Error.

1. A mistake in the calculation of interest, in a settlement, will be relieved against by a court of equity.

*Error to Cooper Circuit Court.*

The opinion of the court contains a full statement of the facts.

*Adams* and *Davis*, for plaintiffs in error, contended that in the settlement between H. L. Boon and John Miller, there

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was a manifest mistake in the calculation of interest; that this mistake was one of fact, and not of law; that it could not have resulted from a wrong construction of the agreement under which the settlement was made, but must have resulted from accident or inadvertence, and therefore should be relieved against by a court of equity. The only question in the books on this subject is, whether a court of equity will not interfere, even where the mistake is one of law.

*Leonard*, for defendants in error.

1. The true construction of the agreement of the 27th June, 1839, required Boon to pay ten per cent. per annum on the \$3000 down to that time.

2. If this were otherwise, that was the construction the parties themselves put on the instrument, and they settled accordingly, and the mistake, if any, was in the true construction of the instrument, which was a mistake of law, and not of fact, and furnished no ground for relief. *Lowry v. Bourdieu*, Doug. 468. *Bilbie v. Lumley*, 2 East. 469. *Clarke v. Dutcher*, 9 Cowen 678. *Mowatt v. Wright*, 1 Wend. 359. *Lyon v. Richmond*, 2 Johns. Ch. Rep. 51. *Mayor of Richmond v. Judah*, 5 Leigh's Rep. 312.

RYLAND, Judge, delivered the opinion of the court.

This was a bill in chancery, filed by the complainants against John Miller and the executrix of Thomas A. Smith, deceased, in the Howard Circuit Court, and afterwards removed to Cooper Circuit Court, on account of the judge of the Howard Circuit Court having been of counsel for one of the parties. The following are the material facts, as appears from the bill, answer and exhibits:

The bill was filed in the Howard Circuit Court, in June, 1845, by Hampton L. and William C. Boon, against John Miller and the executors of T. A. Smith, and stated the following case:

In March, 1834, Miller, Smith and H. L. Boon entered into a mercantile partnership, at Fayette, until 1840, with a capital of six thousand dollars, which was to be advanced

equally by Miller and Smith. Boon was to conduct the business, and the profits were to be equally divided among the partners. The firm commenced business, and carried it on until January 1, 1837, when the partnership was dissolved by mutual consent. The stock on hand was sold on credit, to a new firm, consisting of James Miller and James Smith, for ten thousand dollars, six thousand of which was turned over to the original partners, Smith and Miller, on account of capital stock advanced, and the remaining four thousand dollars left in the hands of the partner, Boon, to close up the affairs of the concern with.

On the 27th of June, 1839, a written agreement was entered into between Miller and Smith, of the one part, and H. L. Boon and W. C. Boon and others, his sureties, of the other part, which, after reciting that the partnership had been dissolved upon the following terms: Smith and Miller to relinquish to Boon all their partnership effects, and Boon, on his part, to refund to Miller and Smith the capital by them respectively advanced, with ten per cent. per annum interest thereon from the time of the respective advancements, and to pay all the demands against the firm, including a note for a thousand dollars and interest, made by Miller to Stanly, for money borrowed to go into the firm, and to guaranty the payment of these demands, provided that H. L. Boon would pay the said demands, and the capital respectively advanced by the partners, Miller and Smith, with interest thereon at ten per cent. from the time the same was advanced, and that Miller and Smith would relinquish to Boon the partnership effects. Miller advanced his three thousand dollars, for capital, about the twelfth March, 1834, and received from H. L. Boon the following sums: 1st January, 1837, three thousand dollars on the indebtedness of James Smith and James Miller. 29th June, 1839, one thousand six hundred and fifty-five dollars, and in 1840, thirty-six dollars. Subsequent to these payments, H. L. Boon discovered that, in settling the amount due Miller for capital and interest, he had made a mistake, which

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consisted in calculating the interest down to the time of the agreement of June, 1839, instead of stopping at the 1st January, 1837, when the three thousand dollars was paid, so that at the time of the payment of the sixteen hundred and fifty-five dollars, that payment exceeded the amount then due four hundred and seventy-seven dollars, allowing Miller ten per cent. interest on his capital down to first January, 1837. Miller, having himself paid off the principal and interest due Stanly on his note, sued Hampton L. and William C. Boon, on the agreement of June, 1837, in the Howard Circuit Court, and recovered the balance due on that account in December, 1844, amounting then to one thousand four hundred and twenty-five dollars, and fourteen cents. Upon this judgment, W. C. Boon paid Miller one thousand and fifty dollars, leaving a balance due on the judgment of four hundred and nineteen dollars, seventy-two cents, for which an execution was in the hands of the sheriff of Howard county.

The prayer of the bill was for an injunction against the judgment till the final hearing, and on the final hearing, that the sum due from Miller, on account on the overpayment, be applied to the payment of the balance due on the judgment, and that Miller be decreed to pay to W. C. Boon the excess, over what was necessary to extinguish the balance due on the judgment.

Smith's executors answered, denying all knowledge of the transaction, and John Miller having died, the suit was revived against his executors, who put in their answer, in which they deny that there was any mistake, and allege that the true construction of the agreement of June, 1839, was, that Boon should pay ten per cent. per annum on the capital, down to that time; that both parties so understood the contract, and that, immediately after the contract, a settlement was made in writing by H. L. Boon of the amount due from him to Miller, under the agreement, in which he charged himself with three thousand dollars, and the interest calculated down to that time, and credited himself with the three thousand dollars re-

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turned in 1837, and Smith and Miller's note for sixteen hundred and thirty dollars, leaving a balance due of three hundred and sixty-two dollars, fifty cents, for which he gave his note to Miller, and thereby settled the account. The defendants exhibited the written settlement in H. L. Boon's handwriting, and the \$362 note, upon which there was a credit for thirty-six dollars paid in 1840.

The cause having been removed to Cooper county, was heard there in September, 1850, and, upon the hearing, the plaintiff read in evidence the exhibits to the bill and answer, and receipts for the money charged in the bill to have been paid by W. C. Boon to Miller on account of the Stanly debt. These exhibits and receipts are as follows :

*Exhibit A.*

Article of copartnership made and entered into this twelfth day of March, in the year eighteen hundred and thirty-four, by and between Thos. A. Smith, John Miller and Hampton L. Boon, witnesseth, that the said Smith, Miller and Boon have this day agreed and do hereby agree to enter into copartnership in the mercantile business, at the town of Fayette, Howard county, Missouri, under the style and firm of Hampton L. Boon & Co. ; the said Smith and Miller agree to furnish the capital, that is to say, at the present time, each agrees, to wit : The said Smith and Miller to furnish the sum of three thousand dollars, making in all the sum of six thousand dollars, and, should a majority of said firm deem it advisable, the said Smith and Miller agree to advance, by the first of February, 1836, such further sum as may be agreed upon by a majority of said firm, for the purpose of establishing a branch of said firm at Huntsville, in Randolph county, in said state, or at such other place as they may deem advisable ; the amount to be expended in the purchase of goods, groceries, hardware, &c., for each and every year, shall be regulated by a majority of said firm. The said Boon is to make all purchases of goods for said concern, and to superintend and conduct the same, subject, however, to the control and supervision of a majority of said firm ; in consideration of which said services to be per-

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formed by said Boon, he is to receive one-third part of the profits arising from the transaction of business by said firm, after deducting therefrom store rent, clerk hire, and all other incidental expenses properly chargeable to the same; the other two-thirds of the nett profits arising from the transactions of said firm to be divided equally betwixt the said Smith and the said Miller. No money is to be loaned from the funds of said concern, but by the consent of a majority of the members of said firm, unless in cases only of small loans to merchants and others, for short periods of time, where it may be found necessary and advisable by said Boon, the active partner. The said partnership to continue and exist until the first day of January, 1841, but may at any time anterior thereto be dissolved by mutual consent of the members thereof, or by the decision of a majority of the members of said firm. An inventory of the goods and effects of said firm shall be taken, and a general adjustment of the accounts and transactions of said firm shall be made, at least once in every year, during the continuance of said partnership. After the said Smith and Miller shall have received, each, the amount of capital by them paid in, respectively, and all just demands against the firm shall have been paid, then the nett profits of said establishment, whenever the firm shall be closed, are to be divided between the parties, as above provided for. The last provision, however, is not intended to preclude either of the individuals composing said firm from withdrawing their proportion of the profits arising from the transactions of said firm, after the capital paid in, and the profits arising from the transactions of said firm shall have amounted to a sum hereafter to be fixed and agreed on by a majority of the partners composing said firm. In testimony whereof, &c., &c.

Witness,  
CHARLES FRENCH,  
TH. REYNOLDS.

T. A. SMITH, (seal)  
JOHN MILLER, (seal)  
H. L. BOON. (seal)

*Exhibit B.*

Whereas, the undersigned, Thomas A. Smith, John Miller and Hampton L. Boon, have been engaged in mercantile business at



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Fayette, Missouri, under the style of Hampton L. Boon & Co., and whereas the said partnership has been dissolved upon the following terms : The partner Boon to refund to Smith and Miller the sums by them respectively advanced, with ten per cent. interest per annum thereon, from the times of the respective advancements, and to pay all demands against said firm, in one year from the date thereof, including a note made by said Miller and Uriel Seabee, to E. Stanly, for one thousand dollars, with interest thereon, and to guaranty the payment of all demands as aforesaid ; and the said Smith and Miller are to release and relinquish unto the said Boon all effects of the said firm. Now it is agreed between the said Smith, Miller and Boon as follows : The said Boon hereby agrees to pay the said Smith and Miller the sums by them respectively advanced to said firm, with ten per cent. per annum interest thereon, from the time the same was advanced ; and the said Boon, together with Nathaniel Ford, Lewis Bumgardner, John R. White, and William C. Boon, as his securities, jointly and severally, agree with the said Miller and Smith, that the said Boon shall and will, within one year from this date, pay and satisfy all claims and demands against said firm, including the aforesaid note made to E. Stanly, hereinbefore referred to ; and the said Smith and Miller hereby convey, assign, transfer, and release unto the said Hampton L. Boon all the money, credits, and effects of the said firm of Hampton L. Boon & Co. It is also further agreed between the parties aforesaid, that the said Miller is to receive, and does now receive from the said Boon, a receipt in full for all claims of the late firm against said Miller. In testimony whereof, the parties aforesaid have hereunto set their hands and affixed their seals this 27th day of June, 1839.

H. L. BOON	(seal)
T. A. SMITH,	(seal)
JOHN MILLER,	(seal)
NATH. FORD,	(seal)
L. BUMGARDNER,	(seal)
JNO. R. WHITE,	(seal)
WM. C. BOON.	(seal)

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Received of H. L. Boon his notes dated this day, with ten per cent. interest thereon, for the full amount due us under this settlement, which notes, when paid, will be in full for the balance due as aforesaid, June 27th, 1839.

T. A. SMITH,  
JOHN MILLER.

*Exhibit C.*, showing the amount invested by John Miller, in the firm of Hampton L. Boon & Co., with interest compounded, at the end of each year, at the rate of ten per cent., and the payments made to John Miller by H. L. Boon.

Invested March 12th, 1834, - - -	\$3000 00
Interest 1st year, \$300; 2d year, \$330, 630 00	
Interest, nine months and 18 days, to 1st	
January, 1837, - - - - -	290 00
	<hr/> \$3920 00
January 1st, 1837, paid by Smith & Miller, -	3000 00
	<hr/> \$920 00
Interest 1st year, \$92; interest 2d year, \$101;	
interest to 27th June, date of final settlement,	
\$55, - - - - -	248 00
	<hr/>
Due John Miller, 27th June, 1839, - - -	\$1168 00
Paid John Miller by H. L. Boon, as follows:	
Smith & Miller's note, dated Feb'y 1st,	
1839, - - - - -	\$1590 00
Interest to final settlement, - - -	65 00
Paid in 1840, - - - - -	36 00
	<hr/> 1691 00
J. Miller overpaid by H. L. Boon, - - -	523 00
Compound interest on \$487, six years, - - -	355 00
	<hr/> \$878 00
Compound interest on \$36, from 1840, is - - -	22 00
	<hr/>
Total due by J. Miller to H. L. Boon, overpaid,	\$900 00

*Exhibit A.*—The said exhibit A, mentioned in said joint

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answer of John O'Fallon and James Miller, executors of John Miller, deceased, reads as follows, to-wit :

Interest on \$3000, as follows :	-	-	\$3000 00
For one year from 1st March, 1834,	-	-	300 00
			<u>\$3300 00</u>
For one year from 1st March, 1835,	-	-	330 00
			<u>\$3630 00</u>
For one year from 1st March, 1836,	-	-	363 00
			<u>\$3993 00</u>
For one year from 1st March, 1837,	-	-	399 30
			<u>\$4392 30</u>
For one year from 1st March, 1838,	-	-	439 28
			<u>\$4831 53</u>
Interest from 1st March, 1839, to 1st July, 1839,			161 05
			<u>\$4992 58</u>

*Cr.*

By Smith & Miller's note,	-	-	\$1630 00
By H. L. Boon's do,	-	-	362 58
			<u>\$1992 58</u>
Cash, original stock,	-	-	3000 00
			<u>\$4992 58</u>

*Receipt No. 1.* "Received of Wm. C. Boon, the sum of one hundred dollars, upon a judgment rendered against him and in my favor, at the last term of the Howard Circuit Court.

"JOHN MILLER.

"Fayette, January 24th, 1845.

"\$100."

*No. 2.* "Received of William C. Boon the sum of three hundred and fifty dollars, being in part payment of a note executed to Elisha Stanly, by John Miller and Uriel Sebree, for one thousand dollars, dated about the year 1834 or 1835, and

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afterwards assumed to be paid by H. L. Boon, with Wm. C. Boon, Jno. R. White, Nath'l Ford, and Lewis Bumgardner, as his securities.

“JOHN MILLER.

“Fayette, December 9th, 1844.

“\$350.”

No. 3. “Received from W. C. Boon, one hundred and fifty dollars, in part payment of a judgment in the Howard Circuit Court, in favor of John Miller, against said Boon, rendered at the December term, 1844, of the Howard Circuit Court.

“\$150.”

“A. LEONARD.

No. 4. “\$500.

“Received from W. C. Boon, five hundred dollars, in part payment of a judgment of the Howard Circuit Court, rendered in December instant, against said Boon, and in favor of John Miller.

“A. LEONARD, Attorney for Miller.”

No. 5. “4th Feb., 1845. Received from W. C. Boon, three hundred dollars, in part payment of the judgment of John Miller, against him, in the Howard Circuit Court, rendered at the December term, 1844, thereof.

“\$300.”

“A. LEONARD, Attorney for Miller.”

This was all the evidence, and the court thereupon dissolved the injunction that had been allowed, on the filing of the bill, and dismissed the bill, with costs, against the plaintiffs.

The complainants contend that there is a mistake in the settlement made in June, 1839, by H. L. Boon and John Miller; that the mistake consists in the calculation of interest on \$3000, paid by Boon to Miller, on the first day of January, 1837; that this mistake amounts to the sum of nine hundred dollars, principal and interest, at the filing of the bill.

The defendant, Cynthia B. Smith, as executrix of Thomas A. Smith, knows nothing about the matter in controversy, and, being but a formal party, the decree of the court, dismissing the bill as to her, will not be disturbed by this court, nor will she be any further noticed.

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The executors of John Miller contend that there is no mistake ; that the settlement was made and the interest calculated down to 27th June, 1839, (two years and a half after the payment of the \$3000,) according to the proper construction and right understanding of the agreement between H. L. Boon, John Miller, Thomas A. Smith, W. C. Boon and others, dated 27th June, 1839, and above set forth, in the statement of the facts of this case, as exhibit to complainants' bill, marked B. They also contend that, if there be a mistake even in the computation of the interest, it is a mistake arising from the construction of the agreement aforesaid, by H. L. Boon himself, a misunderstanding of the agreement—a mistake in law and not a mistake of fact, and, consequently, that a court of chancery will not remedy it or relieve against it.

There is no doubt of the fact, that, prior to making of this agreement, the partnership of Boon, Miller & Smith had been dissolved ; that this dissolution had taken place on the 1st of January, 1837 ; that the firm had sold the stock of goods on hand at that time, to James Miller and James W. Smith, for about \$10,500. There is no doubt also, that Boon paid over, or rather delivered over, at this time, 1st January, 1837, Smith & Miller's note for \$3000, to John Miller, and Smith & Miller's note, for \$3000, to Thomas A. Smith ; thus refunding to each of his partners, in the original firm, the amount of capital furnished by them, at the commencement thereof. These matters are beyond controversy. Here was a payment to each, as a part of his capital, \$3000, as far back as January 1st, 1837, at the first dissolution of the firm of H. L. Boon & Co. This agreement, exhibit B., plainly shows that the firm of H. L. Boon & Co. was, at the making of this agreement, no longer in existence ; it begins by stating that, " whereas, the undersigned, Thomas A. Smith, John Miller and Hampton L. Boon have been engaged in mercantile business, at Fayette, Missouri, under the style of Hampton L. Boon & Co. ; and, whereas, the said partnership has been dissolved upon the following terms" — plainly intimating that the dissolution had

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already taken place, before this writing was made — “have been engaged in business” — that is, heretofore. At the making of this instrument, declaring the dissolution, the firm of H. L. Boon & Co. had sold out to James Miller and James W. Smith, and that sale had taken place on 1st January, 1837, and this written agreement was made June 27th, 1839, nearly two years and six months after the sale and dissolution. By examination of the paper referred to as exhibit marked A., in the answer of the executors of John Miller, and which is set forth in the statement, at the beginning of this opinion, it will be seen that the interest on the \$3000, instead of stopping on the 1st January, 1837, when that sum was paid to John Miller, was still carried on and compounded up to 1st July, 1839; that is, interest was calculated and compounded at ten per cent. on \$3000, for two years and a half, after that sum had been paid to John Miller. The exhibit marked B., will not authorize this; nor can this court suppose it arose from an improper construction of that agreement; nor can it be supposed to arise from any mistake of law. It is a mistake of fact, a wrong calculation as to amount of time; a mere mistake in making the interest run up to 1st July, when the calculation was made, instead of stopping at 1st January, 1837, when the \$3000 were paid. This is such a mistake as, when plainly made to appear, the court of chancery will readily correct; otherwise, from a mere mistake of fact, one man would be allowed an unconscionable advantage over another.

There may be some uncertainty whether the partners, Smith and Miller, advanced \$4000 to the firm of H. L. Boon & Co., each, or whether the sum was but \$3000. In either view, it will not change or alter the mistake in this case. The agreement, made at the time the partnership was formed, expressly states that each one, Miller and Smith, agrees to advance \$3000, so as to make the sum of \$6000 in all. The bill charges that each one put in \$4000. The answer of the executors admits the amount put in to be \$4000. If this be so, or if it be but \$3000, still the mistake is yet plainly to be seen. The



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\$3000 was paid on 1st January, 1837, to John Miller: the liability of Boon to pay the Stanly note of \$1000, with ten per cent., may have originated under the idea that \$4000 was advanced by Miller, and the mistake does not accrue on account of this Stanly note. Therefore, whether the amount be \$3000 or \$4000, it matters not. I have alluded to this, in order to let the parties see it did not escape the revision of the court.

From what appears, then, there was manifestly a mistake in the calculation of the interest, at July 1st, 1839. H. L. Boon paid more to John Miller than he was bound to pay, and the overpayment must be decreed to be repaid by Miller's executors. It is the opinion of this court, that the overpayment made to Miller must bear the rate of interest calculated at the time by the parties, that is, ten per cent.

Looking, therefore, at the calculations made under the two exhibits, the one of the complainants, marked C., and the one to the answer of the executors of John Miller, marked A., we are enabled to come to a proper understanding of the extent and amount of this mistake. Allowing compound interest on the amount put in by Miller, from the time it was invested, viz., 12th March, 1834, up to January 1st, 1837, and the sum is \$3920. At this day, 1st January, 1837, there was paid to Miller \$3000, leaving then due \$920. Interest on this sum, at the same rate, up to the 27th June, 1839, is \$248, making the principal and interest, at ten per cent., compounded yearly, amount to the sum of \$1168, due by Boon at the date of settlement, 27th June, 1839. Now, Boon paid, at the final settlement, Smith and Miller's note, for \$1590, dated 1st February, 1839, amounting to \$1630, interest included up to June 27th, 1839. When this payment was made, there was due only \$1168, leaving then the amount overpaid by Boon to Miller of \$462, on that day; which amount was afterwards increased by the payment of \$36 more in 1840, making in all \$498 overpaid by Boon to Miller, and which, from the time of payment, must be considered as so much money in John

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Miller's hands, to be applied to the satisfaction of the Stanly note, and to be considered as a credit thereon, stopping interest from its payment to said Miller; and the overplus of the payments made on that note, by William C. Boon, after the credits which should be placed thereon, by the amount overpaid as above by Hampton L. Boon to John Miller, must be repaid by the executors of John Miller to said William C. Boon; and the note executed by Hampton L. Boon to John Miller, for the sum of \$362 58, must be cancelled by said executors or be delivered to the complainants to be destroyed.

Hampton L. Boon being bound to pay the debt created by the Stanly note, and William C. Boon and others being his securities in this obligation, and Hampton having overpaid John Miller nearly five hundred dollars more than he was bound by the agreement of dissolution to pay, by reason of the mistake in the calculation of interest, this overpayment to John Miller must be considered as so much money, from the time of overpayment, in the hands of John Miller, to be applied to the payment of the Stanly note, and to be considered as a payment on same note from the date of the payment by Boon to Miller, to-wit, 27th June, 1839, of the sum of \$462, and sometime in 1840, of the \$36. These sums being placed to the Stanly debt, must stop the liability of H. L. Boon and his securities, to pay the several amounts from date.

It is also the opinion of this court, that the amount which William C. Boon has paid, as security for Hampton, on account of the Stanly debt, which exceeds the sum due on the Stanly debt after it (that is, the Stanly debt) shall be credited with the amount in John Miller's hands, overpaid to him by H. L. Boon, as above, shall be refunded, with six per cent. interest from the date of the payment thereof by said William C. Boon, by the executors of said John Miller, to the said William C. Boon; and that the judgment now remaining unsatisfied, in favor of said John Miller v. William C. Boon and Hampton L. Boon, which was enjoined in this cause by the Circuit Court, be forever enjoined. That Hampton L.

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Boon's note to John Miller, for the sum of \$362 58, be delivered to be destroyed or cancelled. That the decree below be reversed, and this cause be remanded, with directions to the Circuit Court of Cooper county to enter a decree in the cause, in pursuance of the principles and directions here laid down—the other Judges concurring herein.

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SHIELDS, Appellant, vs. ASHLEY'S ADMINISTRATOR, Respondent.

1. In a proceeding before a County Court by an administrator, to obtain an order for the sale of real estate claimed as belonging to the estate of his intestate, a party cannot interfere and resist the order of sale, on the ground that he has a superior title. Such a person is not "*interested in the estate*," within the meaning of the 24th section of article 3 of the act concerning administration (R. S. 1845.)
2. County Courts have no jurisdiction to try titles to land.

*Appeal from Benton Circuit Court.*

*Ballou*, for appellant.

*F. P. Wright*, for respondent.

1. This appeal was taken from the County Court upon its refusal to set aside the previous order of sale, and though the statute allows an appeal from orders for the sale of real estate, yet it does not allow an appeal in a case like the present. (See R. C. 106,) and on this ground alone the court did right in dismissing the appeal.

2. The County Court did right in refusing the motion of Shields to set aside the order of sale. He did not make it apparent to the County Court that he was interested in the estate, and no persons but those interested in the estate had a right to appear, even in the first instance. R. C. section 24, article 3. Due notice of the application had been published. Shields did not even offer to appear and resist the application. Nor did he show to the County Court any legal excuse for not doing so; and unless he had shown himself interested in the

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estate, the County Court should not have allowed the appeal, and the Circuit Court did right in dismissing it.

3. Even if Shields had shown to the court that he was the purchaser of the land, it would not have entitled him to appear in the County Court, and resist the order. The lands, at any rate, belonged to Ashley at the time of his death. It was the duty of the administrator to sell all of Ashley's interest therein for the payment of debts. The County Court have no authority to try the title. Nor did Shields become interested in the estate by purchasing the land, so as to entitle him to appear in the County Court and resist the order of sale. None but the heirs can be said to be interested.

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding begun by Atkinson, administrator of Ashley, in the Benton County Court, for the purpose of obtaining an order for the sale of the real estate belonging to the said Ashley, for the payment of debts due from his estate. Shields, who claimed the lands sought to be sold by virtue of a sale of them, made in a suit in chancery against a former administrator of Ashley, and his heirs and widow, came in and opposed the motion, or rather asked to have the order of sale set aside, after it was made. This was refused by the County Court, and on an appeal to the Circuit Court, by Shields, his appeal was dismissed and he appealed to this court.

1. There is no ground for maintaining that, under our law of administration, a proceeding to sell real estate is analagous to the proceedings *in rem*, in courts of admiralty; and that orders of sale, obtained in such a procedure, have the same effect as a judgment *in rem*, in those courts. The statute which declares that the deed given in pursuance to such sales, shall only convey to the purchaser all the right, title and interest which the deceased had in such real estate, at the time of his death, would seem to place this matter in a clear light. But the notice of sale is only required to be given to *persons interested in the estate*. The word "estate" here used, does not mean the real estate to be sold, but the entire estate of the

deceased to be administered upon ; real, personal and mixed. Surely, one who holds by a title paramount to that of the deceased cannot be said to be interested in his estate, nor can one be who claims in the manner it is alleged that Shields claims in this case. The statute contemplated that such only should be affected by the proceedings, as were interested in the general course of administration—the creditors and heirs. Nor does the provision which makes the deed under the sale pass to the purchaser all the right of the deceased, at the time of his death, make Shields interested *in the estate*, in the sense in which those words are understood in the statute.

2. In conferring a power on the County Courts to sell real estate for the payment of debts, it was never designed to invest them with the jurisdiction of trying titles to land. The article in the administration law, respecting the sale of real estate by executors and administrators, clearly shows this. The organization of the courts forbids such a conclusion.

Shields, then, not being interested in the estate of Ashley, had no right to interfere with the proceedings in the County Court, as they could not affect any interest he had in the land sought to be sold, they being, as to him, *res inter alios acta*. Had Shields been a proper party, there would have been no impropriety in his coming in during the same term, and moving to set aside the order of sale. If there was weight in his objections, his neglect to resist the application in the first instance should have been overlooked, on slight considerations. We have not deemed ourselves called upon to pronounce an opinion on the validity of the proceedings in the County Court, as they appear on the face of the record, nor do we now express any ; but we will say it is best for courts to transact their business with such regularity as will prevent future litigation respecting it. When it is foreseen that difficulties may thereafter arise from the omission of statutory requirements, surely it is the part of wisdom to have them supplied whilst it is practicable. This consideration should induce the County Court to retrace its steps and examine whether the law has been

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pursued, in the course which has been adopted. When there is a doubt about the regularity of the proceedings, which result in the sale of real estate, it represses the ardor of bidders at an auction, and causes a sacrifice of the property condemned to be sold. Hence courts cannot be too cautious in requiring, in all such proceedings, a strict compliance with the forms of the law.

The other Judges concurring, the judgment will be affirmed.

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LIVERMORE, Appellant, *vs.* LEONARD, Respondent.

1. A., claiming an equitable title to land, files a bill in chancery against B., who holds the legal title. *Held*, B. may set up in defence a prior equity in C., and is not estopped from so doing, by a written agreement of compromise between him and C., in which it is recited that "B. is satisfied he has an indefeasible title to the land and C. acknowledges he has no just claim to it."

*Appeal from Clinton Circuit Court.*

*Vories and Loan*, for appellant.

The courts in this state will interfere in relation to the title to land which has been granted by the sovereign authority. *Bird et al. v. Ward & Cravens*, 1 Mo. Rep. 281. *Stephenson v. Smith*, 7 Mo. 610. *Groom v. Hill*, 9 Mo. 323. *Ott v. Souldard*, 9 Mo. 581. *O'Hanlon v. Perry*, 9 Mo. 804. *Pettigrew v. Shirley*, 9 Mo. 683. *Allison v. Hunter*, 9 Mo. 749. *Huntsucker v. Clark*, 12 Mo. 333. *McNitt v. Logan*, Littell's Select Cases, 61. *Johnson v. Gresham*, 5 Dana's Rep. 542. *Harrison v. Woodruff*, 6 ib. 188. *Bohannon v. Pace*, ib. 194. *Derrington v. Goodman*, 8 ib. 174.

A preëmption right to state land cannot, under the laws of this state, be sold under execution. *Bower v. Higbee*, 9 Mo. 260. *Paulding et al. v. Grimsley*, 10 Mo. 210. 1 Scam. Rep. 314. 4 Blackf. Rep. 286. Also, the 3d, 9th and 10th sections of the 96th chapter of the Rev. Code of 1845.



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A judgment by confession before a justice, on any other than a regular law day, is void. 12 Mo. 581.

The title bond executed by Townsend to Busby did not vest in Busby any interest in the land in controversy, he not having paid Townsend the consideration therefor or any part thereof. *Bartlett v. Glascock et al.* 4 Mo. 68. *Broadwell & Dyer v. Yantis*, 10 Mo. 399. *Bogart v. Perry et al.* 1 J. C. R. 354. *Modisett v. Johnson*, 2 Blackf. 438.

Leonard is estopped from setting up any equity he may have acquired by his compromise with Busby, by reason of his fraud in obtaining it.

*S. L. Leonard*, for respondent.

The courts have no jurisdiction. The land office has exclusive jurisdiction to try, *first*, the question of settlement; *second*, the question of transfer. R. S. 679, 680, secs. 13, 10, 12, 14, 15. 9 Mo. 188-9. 12 Mo. 337. 3 How. 761-2. The complainant ought to have notified defendant of the trial before the register and receiver. R. S. 671, sec. 9, and instructions of general land office. The courts take jurisdiction of frauds and trusts, but neither is alleged in this case. *Stephenson v. Smith*, 7 Mo. 610.

A state preëmption is saleable on execution. In Illinois, it has been expressly decided that preëmptions under the United States are saleable, except when prohibited by law. *Delaunay v. Burnett*, 4 Gilman, 492. *Turney v. Saunders*, 4 Scam. 531-2. *French v. Carr*, 2 Gilman, 664.

In Alabama, they have decided that an Indian reservation prior to the issue of the patent, is saleable. 10 Ala. 623.

In New York, under a statute less broad than ours, they have decided that one in possession of land, under a contract of purchase, has an interest saleable on execution. *Jackson v. Scott*, 18 John. 94. *Jackson v. Parker*, 9 Cow. 73. The New York statute makes only legal interest liable. The Supreme Court of the United States has decided that it is not the less a contract because the state is a party. *Huidekoper v. Douglass*, 3 Cranch, 1.

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An order of survey and putting the party in possession in Upper Louisiana, is property capable of being alienated and subjected to debts. 9 Peters, 145. Cites further, 2 Story's Eq. sec. 790. 12 Mo. 238. R. S. tit. Execution, secs. 14, 65-6. *Jackson v. Tuttle*, 9 Cow. 233. *Laughlin v. Stone*, 5 Mo. 43. 8 Mo. 200. *Jackson v. Graham*, 3 Caine's Rep. 188. *Jackson v. Bush*, 10 John. 233. *Jackson v. Stewart*, 6 John. 34. *Jackson v. DeWatts*, 7 John. 157. *Jackson v. Henry*, 10 John. 192. *Jackson v. Jones*, 9 Cow. 182. *Page v. Hill*, 11 Mo. 149. *Macklot v. Dubreuil*, 9 Mo. 484. The sheriff acts as defendant's attorney, and where the defendant can sell the sheriff can. 3 Wash. C. C. 546.

United States preëmptions are not saleable on execution, because the United States laws limit them to the actual settler, and prohibit all transfers; but state preëmptions are unrestricted in their sale. The judgment was not void for the reason that it was not confessed on a law day. At all events, being good on its face, it cannot be impeached collaterally by oral testimony. 5 Mo. 233.

The defendant has the legal title, and equity will not divest him of it unless in favor of a superior equity. In this case, defendant has the superior equity. The purchaser under the judgment of a creditor is regarded as a creditor. *Pepper v. Carter & Minor*, 11 Mo. 540. 3 Johns. Ch. R. 275. 5 Mo. 507.

GAMBLE, Judge, delivered the opinion of the court.

This was a bill in chancery, filed by Livermore, claiming to be the owner of the equitable title to a tract of land, against Leonard, who holds the legal title by a patent from the state.

One Townsend was entitled to a preëmption, and sold his interest or right to Busby, and gave a bond to convey the land upon the payment of the purchase money. Two days after the sale, Townsend proved his right of preëmption before the state register and receiver, and obtained the certificate of his having the right of preëmption, under the act of the legislature, Rev. Code, 683, sec. 3. After the sale to Busby, Townsend con-

tinued in possession of the land, as tenant of Busby. Townsend having, after the sale to Busby, confessed a judgment before a justice of the peace, in favor of one Samuel, a transcript of the judgment was filed in the clerk's office of the Circuit Court, and an execution was issued by the clerk, upon which Townsend's interest in the land was sold, and Leonard, the defendant, became the purchaser, and received a sheriff's deed therefor. Leonard, claiming to be the assignee of Townsend's preëmption right, by virtue of the sheriff's deed, paid up the purchase money of the land, and obtained a patent in his own name. After these sales, Townsend, being in possession of the certificate of the right of preëmption, which had been issued to him by the register and receiver, and being utterly insolvent, assigned the certificate to the plaintiff, Livermore, in consideration of the surrender of a note for some fifty dollars, which Townsend owed to Livermore and another person, his partner in a store. When Livermore took the assignment, he knew of the sale to Leonard by the sheriff, and knew of the previous sale to Busby.

Leonard, after he obtained the patent from the governor, made a compromise with Busby, by which Busby agreed not to disturb him in his right to the land.

When we examine our state preëmption law, we find an express provision that preëmption rights shall be assignable. Rev. Code, 680, sec. 13. It sufficiently appears that Busby was the first purchaser of Townsend's right, and that too, for a large consideration; and that, under his purchase, he had possession of the land. The present complainant admits, in his answer to interrogatories filed by defendant, "that he had heard of the trade between Townsend and Busby, when he took the assignment from Townsend.

1. It is difficult to perceive upon what ground the present complainant can claim, that Leonard holds the legal title in trust for him. Busby was the owner of the prior equity, and if any person had a right to claim the legal estate from Leonard, it was Busby, as the owner of that equity. In order to avoid the effect of this clear and well understood principle of

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equity, the complainant insists that, as in the written agreement of compromise between Leonard and Busby, it is asserted that "Leonard is satisfied that he has an indefeasible title to the land, and Busby acknowledges he has no just claim for the north-east quarter of section thirty-three," (the land now in dispute,) therefore Leonard is estopped from asserting that Busby was the owner of the better and prior equity. The effect claimed for this estoppel is to give the title back from Busby to Townsend; whereas, the design of the language was to acknowledge Leonard's title to the land. The instrument commences with the statement that both claim the land, and proceeds to state Leonard's opinion of his title, and then the terms of the compromise by which Leonard had conveyed to Busby another tract of land, in consideration of the money he had paid originally for it, and then follows the acknowledgment by Busby, that he had no valid claim to the land now in controversy, and would not molest Leonard in the enjoyment of it. This language, taken with the context, is the acknowledgment of Leonard's title to the land, and cannot prevent him from using Busby's title against the present complainant.

Many questions were discussed in relation to Leonard's purchase at sheriff's sale, which will not be here considered, because the view before expressed covers the entire merits of the complainant's title.

The decree dismissing the bill is, with the concurrence of the other Judges, affirmed.

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WELLS' GUARDIAN, Appellant, vs. MOORE, Respondent.

1. Under the act of congress of March 3d, 1843, a widow is not entitled to dower in land to which her husband had a mere right of pre-emption, which had not been consummated at the time of his death.

*Appeal from Platte Circuit Court.*

*Hayden*, for appellant.

The wife of Moore is not, as the widow of Horeb Wells,

entitled to dower in the land in controversy, because, 1. Horeb Wells was not, nor was any other person to his use, seized of an estate of inheritance in the land at any time during his life. 2. At the death of Horeb Wells, the land belonged to the United States, in law and equity, and the defendant, Moore, purchased it with the money of complainants, as their guardian, and thereby it became their land and not the land of the deceased. 3. The mere possession of the land by Horeb Wells, at the time of his death, was not such an interest in the land as a court of equity could enforce in his behalf, against the government, and having been abandoned to the complainants by Moore, he cannot resist the rights of the plaintiff asserted in this suit, nor can the court take into consideration the widow's claim, if she had any, as she is not a party to this suit.

SCOTT, Judge, delivered the opinion of the court.

This was a bill in chancery, filed by the complainants, by their guardian, against McLain Moore, the defendant, for an injunction and relief. The complainants were infant children of Horeb Wells, who died in 1839, leaving a widow, Rachael Wells. Horeb Wells, at the time of his death, was residing on a quarter section of land, in township fifty-three, range thirty-six, and was entitled, under the act of congress of 22d June, 1838, to prove a right of preëmption to, and enter the said quarter section. He died, however, before this was done. His widow and children remained on the land. In 1840, Moore, the defendant, intermarried with Mrs. Wells, the widow of Horeb Wells, and lived with her on the quarter section to which her former husband was entitled to a right of preëmption. Moore afterwards, on the 14th May, 1844, entered the land for the heirs of Wells, and took a certificate in pursuance to the act of March 3d, 1843. After entering the land, Moore committed waste and made profits of the timber growing upon it. This bill was brought for an injunction and account. On a reference, the commissioner, in stating the account, acted under the view that the widow of Horeb Wells

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was entitled to dower, and allowed the complainants the profits of two-thirds of the land. This action of the commissioner was sustained by the court below, and an appeal was taken to this court. So the only question in the case is, whether Mrs. Wells, the widow, was, under the circumstances, entitled to dower in the land on which her former husband lived, at the time of his death.

1. We are at a loss to find any ground upon which the widow's right to dower in a claim to a preëmption by her husband can be sustained. The justice of such a claim is obvious, and it is a little remarkable that it should have been overlooked by the congress of the United States, especially as the contingency of the death of the preëmptor was in contemplation when legislating upon the subject. However much we may be disposed to favor such a claim, and although we may regret that no provision has been made for the widow, yet we do not conceive that the omission can be obviated by the action of this court.

Although the act of congress of May 29th, 1850, granting preëmtions to settlers upon the public lands, and the several acts supplementary thereto, were entirely silent in relation to this subject, yet the published circulars of the commissioner of the general land office, recognized the settlement and occupancy of the husband, in the event of his death, as the settlement and occupancy of the wife, and permitted her to prove the right of preëmption and enter the land. Things remained in this state until the 3d March, 1843, when it was enacted, "that in any case, where a party, entitled to claim the benefits of any of the preëmption laws, shall have died before consummating his claim, by filing, in due time, all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of such party, or one of the heirs, to file the necessary papers to complete the same; provided that the entry, in such cases, shall be made in favor of the 'heirs' of the deceased preëmptor, and a patent thereon shall cause the title to enure to the said heirs, as if their names



had been specially mentioned." Here, then, on the death of the præemptor, there is an original grant to his heirs, without any notice or recognition of the widow's dower.

There is no foundation in our law for saying that the widow, as such, is an heir of her husband, but in the event of the failure of all other relatives, who are made heirs by the statute of descents and distributions. The dowress holds of the heir, but by the institution of the law, she is in of the estate of her husband, so that, after the heir's assignment, she holds by an infeudation from the immediate death of her husband. Hence it is, that dower defeats descent, because the lands cannot be said to descend as demesne, which are in tenure; and the assignment of dower, being in the nature of an infeudation, and taking place immediately from the death of the husband, there are only two-thirds which descend as demesne. Butler's note to Coke. A widow comes to her dower in the *per*, by her husband, and is in continuation of his estate, which the heir or *terre tenant* is but a minister or officer of the law to carve out to her. *Ib.* These acknowledged principles of the common law, independently of the first section of the act concerning descents and distributions, clearly establish the position that a dowress, as such, is not an heiress.

The widow, as such, not being an heiress, the only other ground on which it can be conceived that her right to dower exists, is, that there is a resulting trust to her. But this is not tenable. The representative of the husband's estate would not be justified in taking any portion of her dower interest in his estate, and laying it out in the purchase of an interest in the præemption. He could only use the heirs' money for that purpose, and, consequently, the trust can only result to them. The entry in this case is made under the above recited act of 3d March, 1843. It is made in the name of the heirs of Horeb Wells. This must be considered as an original grant to them, and we can find no principle on which the widow is to be allowed dower in a right of præemption not consummated.

In the case of *Davenport et al. v. Farrar*, 1 Scam. 314,

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it was held that a preëmption right is not an estate of which a widow can be endowed.

The other Judges concurring, the decree will be reversed and the cause remanded.

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ELLIOTT, Respondent, *vs.* SANDERSON, *et al.* Appellants.

1. The facts appearing in evidence, the understanding of a witness can have no influence in determining whether one or two persons are bound by a contract.

*Appeal from Platte Circuit Court.*

*A. Leonard*, for appellants.

1. If the contract stated in the pleadings and upon which the plaintiff sought to recover, was in fact made with the plaintiff and another person, instead of being made with the plaintiff alone, it of course defeated the action, and such was the direction the court gave to the jury.

2. The promise made by the defendants, at the settlement, after the work was performed, must be considered as a promise to the persons to whom the defendants were liable, and cannot be considered as a new promise to different persons, extinguishing the old contract, and creating a new liability.

3. As a new promise, it is void for want of consideration, and if valid, is not the promise or liability laid in the complaint. That was a liability to pay for the wintering of the oxen, without condition or limitation. This was a liability upon the settlement, to pay the balance struck, as soon as the defendants should receive from the government the money due them for the same service.

*Hayden and S. L. Leonard*, for respondent.

The instruction given by the court, on its own motion, was correct. 2 Greenl. Ev. secs. 127-8-9. The contract was first made with Elliott for two hundred steers. They talked of substituting a new contract, in writing, with Elliott & Rey-

nolds, but it was never executed. Admitting the matter was in doubt whether Elliott & Reynolds were partners, the settlement, after it was all over, and the recognition of Elliott as sole contractor, and the promise to pay him, fixes plaintiff as the one to whom the money was coming.

SCOTT, Judge, delivered the opinion of the court.

This was a suit brought by the plaintiff against the defendants for feeding cattle for them. The defence was, that there was a party plaintiff, with whom the defendants had contracted, who should have been joined; and that the cattle were not fed as they should have been, under the contract.

The plaintiff proved that the contract had been made with him for keeping the oxen, and that they were fed by him. A witness was present at a settlement with the plaintiff by one of the defendants. There was also some evidence of a contract to which one Reynolds was to have been a party, but it appears that it was never executed, although a witness says he considered both Elliott and Reynolds equally bound under the contract, and that the defendants were bound to them jointly, although the contract was not executed by Elliott and Reynolds.

The court instructed the jury that, if they believe the contract was made with the plaintiff and one Reynolds to keep the cattle, Elliott cannot recover in the present suit.

If they believe the plaintiff was to keep the cattle upon corn, hay and fodder, or any of these articles, and failed to do so, that they may deduct from the amount claimed what they were damaged by the non-performance of this contract, by the plaintiff and Reynolds: "*Provided, however, the foregoing are upon this condition, that is, if, after the keeping of the cattle was completed, a settlement was had between plaintiff and defendants, or one of them, or their agent, and upon such settlement it was agreed to pay plaintiff a specific sum, then the jury will find for plaintiff that sum.*"

1. From the evidence in the cause, the court was warranted in giving the qualification to the first instruction. We do not think there was a foundation for the argument, that the con-

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tract to pay should be construed to both Elliott and Reynolds. The condition on which Reynolds was to become a party to the contract was never complied with, nor was that contract ever executed. The facts appearing in evidence, the understanding of the witness can have no influence, in determining who was bound by the contract. It was a matter of law, about which his impressions were of no avail.

The question as to whether the money had been received from the United States, by the defendants, before the institution of the suit, was not raised on the trial of the cause below. No exception was taken on that score, and we do not feel ourselves called upon to determine it for the first time on this appeal.

The other Judges concurring, the judgment will be affirmed.

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COLLIER, Plaintiff in Error, *vs.* SWINNEY, Defendant in Error.

1. The law which controls the liability of common carriers does not begin to apply until the actual bailment is made. The act of God will not excuse a man for failure to comply with an absolute contract to receive and transport goods at a future time, merely because he is a common carrier.

*Error to Saline Circuit Court.*

*Clark*, for plaintiff in error, contended that the law governing common carriers does not apply. The defendant, though a common carrier, took upon himself, by his express contract, a duty greater than the law would impose, and having done so for a legal consideration, he cannot set up the acts of God as any excuse for his non-compliance with the contract. He ought to have guarded against such contingencies in his contract. *Chitty on Contracts*, 734. *Thompson v. Miles*, 7 T. R. 384.

The only acts of God which would excuse a common carrier are inevitable accidents not foreseen by him, and against which he could not guard. In this case, the evidence showed none such. On the contrary, it showed that, though the Wa-

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pello could not run, other boats were running. The contract of the defendant was, to carry the tobacco to St. Louis ; and if the Wapello could not run by reason of low water, he was bound to carry it on some boat that was running. Again, low water could have been foreseen. It is annual and certain. This, therefore, was not such an act of God as would excuse even a common carrier who had not made a special contract. Story on Bailments, secs. 25, 36, 489, 511. 1 Peters, 66, 91, 221.

If low water would have excused the defendant for a given time, still he was bound to perform, or offer to perform his contract, within a reasonable time after the obstruction was removed.

*Adams and Leonard*, for defendant in error.

The falling of the river was such an act of God as will excuse common carriers from the performance of contracts of affreightment. Story on Bailments, secs. 511, 545. *Bowman v. Teal*, 23 Wend. 306. *Parsons v. Hardy*, 14 Wend. 215. *Hand v. Baynes*, 4 Whart. 204, 210. 3 Kent's Com. 248, 249.

The contract of affreightment was entire and indivisible, and the plaintiff, by shipping ninety-eight hogsheads of the tobacco before there was any breach of the contract on the part of the defendant, put an end to the contract.

The master had no right, as such, to bind the owners to carry freight on any other boat, and if he had, no such contract is declared on, nor is there any proof of any such contract.

GAMBLE, Judge, delivered the opinion of the court.

The defendant, Swinney, was part owner of the steamboat Wapello, and Eaton the master. She was employed as a weekly packet between Glasgow and St. Louis. Eaton contracted, as master, in 1846, with the plaintiff Collier, to transport the tobacco which Collier then had at Glasgow, to St. Louis, for two dollars and fifty cents per hogshead ; and such other tobacco as Collier might deliver at Glasgow on or before the first of September, was to be transported to St.

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Louis, in a reasonable time after its delivery, for two dollars per hogshead. Collier complains that tobacco which he delivered at Glasgow, prior to the first of September, was not transported to St. Louis by the defendant's boat, by reason of which neglect he was compelled to ship it on other boats at a higher freight, and by the delay occasioned by the breach of contract, he lost the advantage of high prices in St. Louis: The defence to the action rested mainly on the facts that the river became so low in July that the Wapello could not navigate it; and that before it rose, the plaintiff shipped a part of his tobacco on other boats, and finally, that before the river rose, the Wapello was accidentally sunk and lost.

It appeared in evidence that the Missouri became too low for a boat as large as the Wapello to navigate it, as early as the month of July, and continued low until after the first of September, although other boats continued to ply upon it, and transport freight during all that time. It also appeared that, during that period of low water, and after the first of September, the plaintiff shipped on other boats a part of the tobacco which the Wapello was to carry.

The court, at request of defendant, gave the following instructions:

"If the jury find from the evidence that, after the making of the contract, and before there was any breach thereof, the river became so low as to prevent the steamer Wapello from carrying the plaintiff's tobacco from Glasgow to St. Louis, this was an act of God which excused the defendant from the performance of his contract, and the jury must find for the defendant.

"The jury must disregard, as any evidence in the cause, all testimony going to show that the defendant contracted to carry out the plaintiff's tobacco, notwithstanding the river should become too low for the Wapello to run, and all testimony going to show that the master of the boat contracted to carry out the plaintiff's tobacco on another boat, in the event of the river becoming too low for the Wapello to run.



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“If the plaintiff delivered at Glasgow three hundred and forty-one hogsheads of tobacco on or before the first day of September, 1846, under the alleged contract, and the defendant was prevented by the low water from carrying out all this tobacco, during the year 1846, and the plaintiff, during the same year, and before the rising of the water so as to enable the Wapello to run, shipped ninety-eight hogsheads of the tobacco on other boats, on his own account, he thereby put an end to the contract, and the Wapello, even if able, was discharged from her obligation to carry out the balance of the tobacco thereafter.”

The court, of its own motion, gave this instruction :

The court instructs the jury that, if they believe from the evidence that Nathaniel J. Eaton, as master of the steamboat Wapello, in May, 1846, agreed with plaintiff for the price of two dollars per hogshead, to ship and carry all the tobacco in hogsheads which he, the plaintiff, should deliver at Glasgow, between that time and the first day of September in the same year, to St. Louis, in a reasonable time after the delivery of the tobacco at Glasgow, and that said Eaton did not ship and carry said tobacco from Glasgow to St. Louis, as contracted, and that, at the time of making said contract, William D. Swinney was a part owner of the said Wapello, they should find for the plaintiff, unless they should believe from the evidence that, before there was any breach of said contract, the Missouri river became so low that it rendered it impossible for the said boat, Wapello, to carry said tobacco from Glasgow to St. Louis.

A proper interpretation of this contract is, that the tobacco brought by Collier to Glasgow for shipment to St. Louis, should be transported to St. Louis in a reasonable time after the delivery of each lot at Glasgow, and not that the reasonable time for transportation was to commence after the first of September. It appears by the testimony of the witness, (Garth,) who proved the contract, that the agreement to trans-

port the tobacco in a reasonable time was a part of the express contract of the parties.

1. We have examined the authorities, upon which the defendant relies to show that a common carrier is discharged from liability for any delay in the performance of his contract, when the delay is occasioned by the act of God. A common carrier assumes a liability by the acceptance of goods for transportation, which the law imposes upon him, without any express contract. He is so bound by law that nothing but the act of God or of public enemies will discharge him from his obligation to deliver the goods; but such acts will discharge him. It is apparently a regular deduction from this admitted law, that the operation of the causes which would exonerate him, if the goods were destroyed and not delivered at all, will exonerate him from liability for delay, when that is the consequence produced by them. The exemption from liability for delay has been carried farther, and it has been held, that, in respect to the *time of delivery*, a common carrier is responsible only for the exertion of due diligence. *Parsons v. Hardy*, 14 Wend. 215. In the present case, it is unnecessary to discuss this question. The case before us is not one that requires any investigation of the law of common carriers. The law in relation to the duties and obligations and exemptions of carriers is only applicable to contracts concerning goods which the carrier has received for transportation. It is not supposed that a contract which the master of a vessel may make for the transportation of goods next year, and which goods may not now be in existence, imposes any liabilities or allows of any exemptions because one party is a common carrier. The law applicable to common carriers begins to apply when the actual bailment is made. If, then, a man, who is a common carrier, makes a contract for the future transportation of goods, and at the time appointed fails to have his boat at the place, he is no more exonerated by the act of God from liability for a failure to comply with an express stipulation of his contract,

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than any other man would be for a failure from the same cause to comply with any other kind of contract. The rule, in relation to this excuse for a failure to perform a contract, is, that, where the law imposes the duty, the law will acknowledge the act of God to be an excuse for its non-performance; but where a man, by his own contract, expressly and absolutely undertakes to do any act, he cannot be discharged from its performance by the act of God, because it was his own folly not to have made the proper exception.

It appears that the express contract in this case was to transport the tobacco in a reasonable time. The reasonable time spoken of has no reference to the size or the qualities of the Wapello, as causes for the extension of the time. As the master must be understood to have contracted that his boat should carry the goods, the contract must be understood to mean that his boat *should be able to carry them* in a reasonable time for such transportation. If there was any thing peculiar in the construction of his boat, or if she was of a larger size than ordinary, the risk of delay from such causes is not to be thrown on the owner of the goods. The question as to time, under this contract, is, what was a reasonable time, after the delivery of the tobacco at Glasgow, for Collier to have it delivered in St. Louis, under all the circumstances? If navigation was entirely suspended when he delivered it, then the computation of the reasonable time would commence upon its re-opening; if the water was so low as to render the transportation slow and difficult, then the time must be longer than if the water was high. But when the reasonable time is thus ascertained, the master of the Wapello must be understood to have contracted that she would, within that time, transport the tobacco to St. Louis. The Circuit Court seems to have entertained the idea, that, as the transportation was to be on the Wapello, the reasonable time was to be computed with reference to her size and qualities, which would have the effect of throwing upon Collier all the consequences of her defects or unfitness for the navigation. Nay, it is even put more strong-

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ly in some of the instructions, for it is asserted that if the water became so low that the Wapello could not navigate the river, then the defendant was discharged from his contract. This is given as the rule, although it appears that other boats were navigating the river during the season. If we regard the master as contracting that his boat shall do what other boats at the time are doing, we will have a better access to the meaning of the parties. Let it be construed as if made by Eaton, without his being concerned with or interested in any boat. Then we will have him undertaking to transport the tobacco in a reasonable time, and the question will not be, whether there was sufficient water for one boat or another, but whether there was an entire suspension of navigation. His office on the Wapello, and the fact that the transportation was to be on that boat, are only material to connect the defendant, as a part owner, with the contract. There was, in the present case, no reason for the application of the rule that the act of God will excuse a common carrier from a compliance with his contract. The only question was, whether he had failed to transport the tobacco, according to the express terms of his contract, in a reasonable time after its delivery at Glasgow. Upon this question the condition of the river is to be considered, only as it might extend the time within which Collier could reasonably expect to have his tobacco transported to St. Louis.

The judgment, with the concurrence of the other Judges, is reversed and the cause remanded for further proceedings.

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GARTH, Respondent, *vs.* EVERETT, Appellant.

1. A. brought an action of trespass against B, for the value of a negro woman slave taken and converted by B, to his own use, and recovered a judgment, which was satisfied. During the pendency of the suit, the slave was delivered of a child. A. afterwards brings another suit for the value of the child. *Held*, A. cannot recover, as the interest which accrued during the pendency of the first suit, by the birth of the child, was merely an incident to the principal object of the suit, and might have been taken into consideration by the jury in assessing the damages in that suit.

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*Error to Morgan Circuit Court.*

*Wright*, for plaintiff in error.

By bringing the suit for the *value* of the slave, Garth abandoned his property in her, and by the judgment in that suit, or at any rate, by the judgment and satisfaction of the same, the title to the slave, Celia, became completely vested in Everett. 2 Kent, 386-7. *Foreman v. Neilson*, and *Norrill v. Corley*, 2 Rich. S. C. Eq. Rep. 288. 1 Rawle, 121. 4 ib. 285-6.

After the judgment and satisfaction, Everett's title to the slave, Celia, related back to the time of the conversion, or at least, to the time of the institution of the first suit, and by the rule of law, *partus sequitur ventrem*, the title to the child became vested in Everett from its birth. *Daniel v. Holland*, 4 J. J. Marshall (Ky.) Rep. 26. 6 Bacon's Abridgment, *Trover*, A. Strange, 1078, referred to in Law of Slavery.

*Hayden*, for defendant in error, contended that Garth was the owner of the slave, Celia, at the time she gave birth to the child, and that Everett had no right or title to her, before he had paid and satisfied the damages assessed against him for his wrongful conversion of her. 1 Greenl. Ev. sec. 533 and note and authorities there referred to. 2 Kent, 388. 8 Cow. 43, 44. 6 Johns. 168.

Therefore the maxim, *partus sequitur ventrem*, applies. Haywood's Rep. side pages, 233, 234. 7 Monroe, 231. 1 Marshall, 531. 2 Kent, 361. 12 Whea. 568.

SCOTT, Judge, delivered the opinion of the court.

This was an action for a slave, Jacob, a child. It appears that Garth brought an action of trespass against Everett, for taking and converting to his use a negro woman slave, the property of Garth. In this suit, Garth recovered damages equivalent to the value of the slave. There was an execution on this judgment, which was satisfied. During the pendency of the action just referred to, the woman slave, who was the subject of the controversy, was delivered of a child, and Garth

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has now brought this suit to recover the value of the child which was taken and converted by Everett to his use. The slave was estimated to be worth \$150. On a trial in the court below, the judge was of the opinion, that the child belonged to the plaintiff, and so instructed the jury, who found a verdict accordingly, on which, judgment being rendered, this writ of error was sued out.

1. The maxim, *partus sequitur ventrem*, with regard to slaves, does not seem to affect the question involved in this cause. That maxim, it would appear, had its foundation in motives of humanity. By the common law, if one had a limited property in beasts, the natural increase of such beasts, during the continuance of the temporary proprietorship, belonged to the owner of the limited interest. The civil law, which we have adopted in this respect, declared that where a partial ownership existed in slaves, the increase should follow the mother, or go to the general owner; thus taking care that the mother should not be parted from her child. *Lewis v. Davis*, 3 Mo. Rep. 133. There is a law of Mohammed which prohibits, in the sale of captives, the separation of the mothers from their children. If this be the foundation of the maxim, it would seem rather to operate against the claim of the plaintiff, as his success can only be founded on the idea of a separation of the mother and child, as it cannot be pretended that the trespasser can have any property in the subject which he may make the object of his rapacity, as against the rightful owner. In such cases, there is no rightful ownership against the true owner, consequently there can be no limited proprietorship in the sense in which it is used in the application of the maxim *partus sequitur ventrem*.

There can be no doubt that a judgment in an action of trespass, and satisfaction thereof, will transfer the title of the owner to the trespasser, when damages are given for the value of the property. Yelverton, folio 68, note. In considering this case, it is taken for granted that the damages recovered in the suit for the mother, were for her value. In this



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case, it does not seem material whether the transfer of property relates back to the time of the conversion or to the time of satisfaction being made. Suppose a trespasser takes and converts a flock of sheep, and during the pendency of a suit to recover their value, they should have lambs, would they be the property of the trespasser after judgment and satisfaction for the value of the sheep, or the property of the original owner? So if a mare with foal should be converted by a trespasser, and pending a suit for the wrong, she should be delivered of a colt, would the colt, after satisfaction, belong to the owner or trespasser? It is conceived that the proper course in such cases is to bring the fact of the increase to the knowledge of the jury, who will be required to appreciate it in the assessment of damages, and if there is a failure to do this, there can be no future redress, no more than if from any other cause, there should be an omission to estimate truly the value of the property.

There is no hardship in this course; the plaintiff went for trespass which disaffirmed property, and sought its equivalent in damages, in assessing which, the jury may, at their discretion, award them according to the value of the property at its conversion, or at any subsequent time. 2 Leigh, N. P. 1500. The value of the goods is the ordinary measure of damages, but the jury may go beyond it. 4 Watts, 418. Where the action is for bonds, the measure is the amount which may be recovered upon them. 2 Rawle, 241. This last case furnishes an apt illustration, it is conceived, of the principle here involved. These damages were recovered for a conversion of property which was not in existence at the time of the commencement of the action, viz: the interest which accrued during its pendency being regarded as incident to the principal.

The other Judges concurring, the judgment will be reversed and cause remanded.

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Johnson v. Jones et al.

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JOHNSON, Defendant in Error, vs. JONES *et al.*, Plaintiffs in Error.

1. A set off is not admissible where the claim on either side is for unliquidated damages.

*Error to Jackson Circuit Court.*

*Sheley*, for plaintiff in error, contended that, under section 12 of article 7 of the new code of practice, the set off was admissible.

*Hayden*, for defendant in Error.

GAMBLE, Judge, delivered the opinion of the court.

Johnson sued Jones and others, alleging that in consideration of his giving the ground upon which a railroad was to be located through his land, the defendants, as members of the association for constructing the road, agreed to make a fence of a certain description on each side of the ground so given, and alleges the failure to make the fence, with a statement of the damages he had sustained thereby. The defendants, in their answer, admit the facts stated in plaintiff's petition, and by way of defence, set up as an offset a balance due from the plaintiff to the railroad association, upon a subscription made by him, which balance was, according to the terms of the subscription, payable to the defendants. The parties proceeded to trial, and the court disregarded the set off, because the plaintiff's action was for unliquidated damages, and in such case, a defence by way of set off was not allowed, and gave judgment for the plaintiff. This is the only question upon which the parties desire our opinion.

1. This court, at the last January term, in the case of the state to the use of *Cowan v. Modrell and others*, decided that where the claim on either side was for unliquidated damages, a set off could not be admitted as a defence.

The judgment is, with the concurrence of the other Judges, affirmed.

BLAIN, Appellant, *vs.* COPPEDGE, Respondent.

1. The plaintiff in an ejectment offered in evidence, in support of his title, a transcript filed in the Circuit Court of a judgment rendered before a justice of the peace. He then offered an execution issued from the Circuit Court, which, on its face, purported to be on a *judgment of the Circuit Court*, and a sheriff's deed, under this execution, and reciting it. *Held*, the execution and sheriff's deed were properly excluded.

*Appeal from Crawford Circuit Court.*

*Gardenhire*, for appellant, insisted that the sheriff's deed was certainly competent evidence, because, with its recitals, it is, by express statute, made evidence of the facts therein stated. Rev. Stat. p. 484, sec. 49. It was not necessary to offer the execution.

*Johnson* and *Frissell*, for respondent, insisted that the court properly excluded the execution from the jury, because, 1. There never had been any execution issued by the justice who first rendered judgment, and a return of *nulla bona*. See Laws of 1835, tit. "Justices' Courts," art. 6, secs. 18 and 19, p. 364. *Coonce v. Munday*, 3 Mo. 264, new ed. *Burk et al. v. Flournoy et al.* 4 Mo. 116. 2. The execution did not conform to the judgment. See Laws of 1845, tit. "Execution," sec. 1. Tit. "Judgment and Decrees," secs. 3 and 12. *Tucker's Commentaries*, vol. 2, p. 238. *Robinson's Practice*, vol. 1, p. 571. *Bacon's Abridg.* tit. "Execution." It was necessary for the plaintiff to go behind the sheriff's deed and show the inception of his title.

GAMBLE, Judge, delivered the opinion of the court.

Blain sued Coppedge in ejectment, and on the trial, produced the transcript of a judgment rendered by a justice of the peace against one Swinney, in 1842, for \$40 debt and \$4 50 interest and costs. Two days after the judgment was rendered, a transcript was filed in the clerk's office of the Circuit Court. He next produced a judgment of the Circuit Court reviving this judgment, and also its lien. This judgment of the Circuit Court was in 1848. An execution, issued from the

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Circuit Court, was next produced, which, on its face, purports to be issued upon a judgment of the Circuit Court, and has no reference whatever to any judgment of a justice of the peace. This execution, upon an objection made by the defendant, was excluded. A sheriff's deed was next offered, which recited the execution that had before been excluded, and this, of course, was excluded. The plaintiff then took a non-suit and brings the case here, complaining of the exclusion of his evidence.

1. As the plaintiff was bound to produce a judgment, as well as an execution, and as he produced a judgment of a justice of the peace, he ought to have had an execution which is issued upon that judgment. The execution he produced certainly purported to be issued upon a different judgment, for it recites a judgment of the court. It could not be issued upon the judgment of the Circuit Court produced in evidence, for that was not a judgment of recovery, but an award of execution upon the justice's judgment. For this reason, the execution was properly excluded, and as the sheriff's deed recited this same execution, and the sale was made by its authority, the deed was properly rejected.

If there had been an execution produced, which issued upon the justice's judgment, then the question of the authority to issue it, before one had issued from the justice, would have been presented under *Coonce v. Munday* 3. Mo. Rep. 374. *Burk v. Flourney*, 4 Mo. Rep. 311. The judgment is, with the concurrence of the other Judges, affirmed.



HAYS, Plaintiff in Error, *vs.* BELL & WILLIAMS, Defendants  
in Error.

1. If there is any evidence, however slight, it is error for a court to tell a jury there is none.
2. It is error for a court to give instructions to a jury, which are supported by no evidence.

*Error to Howard Circuit Court.*

*Prewitt* and *Henry*, for plaintiff in error, insisted that, admitting the allegations in defendants' answer to be true, plaintiff

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was entitled to a judgment for the principal of his debt ; and cited, *Connor v. Hackley*, 2 Met. 613. *Bradley v. Covel*, 4 Cow. 349. 5 N. H. 294. 15 John. Rep. 505. 5 T. R. 471. Selwin N. P. 1118. 4 Bingham, 309. 5 ib. 132. No new contract was proved. A verdict will not be sustained, where there was no evidence to support it, or where the jury could not have found it, without assuming a principle against the law. *Todd v. Boone Co.* 8 Mo. 431.

*Clark*, for defendants in error, cited 12 Mo. Rep. 194. *Oldham v. Henderson*, 4 Mo. 301. *Mulliken v. Greer*, 5 Mo. 493. *Lackey v. Lane & McCabe*, 7 Mo. 220. *Dooley & Kirkland v. Jennings*, 6 Mo. 61.

RYLAND, Judge, delivered the opinion of the court.

The following is the statement of the facts of this case, which I embody as part of my opinion, in order that the points decided may be properly understood.

Hays sued Bell and Williams in the Howard Circuit Court, on a bond for \$750, dated 13th April, 1841, and bearing ten per cent. per annum interest from date, given to Irvin W. Hays, endorsed by him in blank, and on the 25th October, 1849, endorsed by William B. Hays to plaintiff.

Plaintiff's petition alleges that Irvin Hays endorsed and delivered said bond to William B. Hays, who, on the 25th October, 1849, endorsed and delivered it to plaintiff, and that said bond and ten per cent. per annum interest thereon are due him.

Defendants' answer alleges that they borrowed the money of Irvin and William B. Hays, and that, at the same time, defendant, Williams, delivered to them a negro man, named Peyton, to be kept by them for twelve months, for the interest of said money for that time ; that he and they, under the name of "I. W. Hays & Brothers," entered into a written agreement to that effect ; that the slave remained in their possession from then until the 26th October, 1849 ; that the slave was worth at least one hundred and fifty dollars per year, and would have hired for that sum ; that after the first year, defendants were

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entitled to receive a credit on said note, for each year, for the worth of said negro's hire, and that Irvin and William B. Hays were the owners of the bond until the 25th day of October, 1849, the date of William Hays' assignment to plaintiff.

On the trial, plaintiff read in evidence the bond and endorsements, and defendants then proved, by William Herriford, that Irvin Hays signed the agreement referred to in defendants' answer, and that witness attested it.

"\$750.

"CHARITON, April 13th, 1841.

"Twelve months after date, with interest at the rate of ten per cent. per annum, from date until paid, I, William Williams, as principal, John M. Bell and William Feazel, securities, agree to pay Irvin W. Hays, the sum of seven hundred and fifty dollars, for value received.

"WM. WILLIAMS, [seal.]

"JNO. M. BELL, [seal.]

"WM. M. FEAZEL," [seal.]

The following endorsements appear on the back of said bond:

"Irvin W. Hays.

"For value received, I assign the within note over to Marion W. Hays, without defalcation or discount, this October 25th, 1849.

"WM. B. HAYS."

"This agreement between Wm. Williams, of the one part, and Irvin W. Hays & Brothers, of the other part, witnesseth, that I, the said Williams, have this day hired to said Irvin W. Hays & Brothers, a negro man, named Peyton, for which said Irvin W. Hays & Brothers accommodate said Williams with the sum of seven hundred and fifty dollars, for the use of which, said negro is to serve the said Irvin W. Hays & Brothers, for the term of twelve months from this date; said I. W. Hays & Brothers further agree to furnish said negro with summer and winter clothing.

"WM. WILLIAMS.

"I. W. HAYS & BROS.

"Thorntonsburg, April 13th, 1841.

"Witness: WILLIAM HERRIFORD."



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The agreement was then read, and witness further stated that during that year, as he thought, some tobacco was put up at the farm of Benjamin Hays, the father of Irvin and William Hays and the plaintiff; that some time during the summer it was brought to Carson & Hays' store, at the mouth of the Chariton, to be shipped by them, and that Irvin, who was one of the firm of Carson & Hays, told witness to mark the tobacco "I. W. Hays & Brothers," which he did; that he was then clerk of Carson & Hays; that that firm consisted of W. and N. Carson and Irvin W. Hays, and that he knew of no other transaction except those in which the name of "I. W. Hays & Brothers" was used. It was proved by defendants that Peyton served Carson & Hays for seven or eight years; that he was an excellent hand, and that such hands were worth one hundred and fifty dollars per year, and that hemp hands in the year 1842, hired from \$150 to \$200 per year.

Plaintiff then introduced evidence to show that Benjamin Hays was the guardian of William Hays; that the money loaned by Irvin Hays was his as such guardian; that he authorized Irvin to lend it out for him; that Irvin gave him the note in a few days after; that he did not know Irvin had lent it in Irvin's name until then, and did not know that Irvin had taken Peyton for the interest until some time after; that there was no partnership between Irvin and William Hays; that William was then a minor, under his guardianship; that shortly afterwards, during that year, when William came of age, he settled with the court and gave this note to William as part of his money; that William inherited it as heir of one Bartley, and that Irvin was then of age and had no interest in that money; that the tobacco marked "I. W. Hays & Brothers," was Benjamin Hays' tobacco, and was put up in 1842; that Carson & Hays failed in 1845, and that William Hays told Williams, the defendant, in the spring of that year, that he would not look to Carson & Hays any longer than to the 13th April, for the interest of the bond.

Plaintiff also proved by William D. Swinney, that he had a

conversation with the defendant, Williams, in the year 1845, and at various times up to that time, in which Williams told him that Peyton was working for the interest of this bond; that he thought Peyton would hire for more, and he wanted to borrow money of witness to pay the note and get his boy.

The court instructed the jury on plaintiff's motion,

1. That if Williams hired the negro Peyton to I. W. Hays & Brothers, for one year, for seventy-five dollars, and the negro was kept by them or either of them, without objection by Williams, and without any new agreement between the parties, then the law presumes that the hiring continued at the same rate, although they may believe that the negro was worth more.

5. That if, at the end of the first year, Williams hired the negro Peyton to Carson & Hays, and if William B. Hays was the owner of the note and agreed to look to Carson & Hays for the interest of his money, and that William B. Hays, in the year 1844, or beginning of the year 1845, notified the defendant, Williams, that he would not take them longer than to the 13th day of April, 1845, for the interest, then the jury will find for the plaintiff the principal, and interest thereon at ten per cent. from that date, unless they believe that William Hays, after he so notified said Williams, agreed to take Irvin Hays, or the hire of the negro Peyton to Irvin, as a payment on said debt.

The plaintiff also asked the following instructions, which were refused, and the opinion of the court excepted to.

3. That if William B. Hays, after he got the note, told Williams that he would not take Carson & Hays, who had the negro, longer than to the 13th April, 1845, for the interest of the note, then defendants are not entitled to a credit for the interest of the note since that time, although they may believe that Carson & Hays or I. W. Hays had said negro afterwards.

4. That if Williams and William B. Hays agreed that Hays should look to Carson & Hays for the interest on the money in this note, on account of their having Peyton, yet, the de-

defendants are liable for the note and interest after William notified him that he would no longer look to them for the interest, although Carson & Hays continued to hold Peyton.

5. There is no evidence before the jury that William was in partnership with Irvin, at the time of making the note sued on, in hiring the negro, Peyton.

The court also gave, on defendant's motion, the following :

1. The jury are the proper judges as to whether I. W. Hays and William Hays were partners in the contract of hiring ; and, of its own motion, the following :

1. That the hire of the negro, Peyton, to Irvin Hays, is an offset or payment of the note, if so agreed, until Williams, the defendant, had notice that the note had become the property of another person.

2. That if William Hays became the owner of the note and agreed to take Carson & Hays or I. W. Hays, or the hire of the negro, Peyton, in discharge of said note, or any part of the same, a deduction from said note should be made in conformity with the agreement.

3. That the agreement may be established by circumstantial evidence.

To the giving of all which instructions, plaintiff objected and excepted.

The jury found a verdict for plaintiff for forty-three dollars and forty-six cents, which plaintiff moved to set aside, because it was against the law and evidence and the instructions of the court. The court overruled the motion and gave judgment on the verdict, to which plaintiff excepted, and brings the case here by writ of error.

The giving and the refusing of instructions, as appears from the above full statement of the facts of the case, are the only points which call for the consideration of this court. The plaintiff below obtained a judgment, which, being for less than he thought his right, he moved for a new trial, and brings the case here by appeal.

There is nothing requiring this court to consider the instruc-

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tions given for the plaintiff, as the defendant does not object, and the plaintiff has no right to complain of them, they being given on his own motion.

The three instructions, which the court refused to give, as asked for by the plaintiff, were, no doubt, refused upon the ground which authorized the single instruction given for the defendants.

1. It was for the jury to determine, upon the evidence, whether there was a partnership at the time of the hiring, between I. W. Hays and William Hays, as to the hiring. If there was a partnership in the hiring of the negro, at the time, and the boy was continued in their possession, or under their control, under the original hiring, then these instructions were properly refused. The court has the right, and it may be sometimes properly exercised, to declare that there is no evidence before the jury of such and such events or facts; but it is to be exercised with great caution. It is always safer and more conducive to a proper finding by the jury, to have such matters stated hypothetically. If there be any evidence, however slight or insufficient, it would be error in the court to say to the jury that there is none. In the opinion of this court, then, there is no error in refusing to give the instruction which declares there is no evidence of the partnership in this case; consequently there is no error in giving to the jury the instruction, which the defendants prayed the court to give, and which was given, informing the jury that they were the proper judges whether there was proof that I. W. Hays and William Hays were partners in the contract of hiring the negro or not.

The instructions given to the jury, on the court's own motion, now remain for our consideration.

2. In our opinion, the two first instructions thus given, are erroneous, for the reason that they were not warranted by the evidence given in the case before the court and jury.

There is no evidence showing that the hire of the negro was to be applied to the payment of the note, or as an offset against it. The evidence has a contrary tendency. The hire of the

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negro was for the use of the money, or to discharge the interest arising on the loan.

Neither was there any evidence of any agreement on the part of William Hays to take Carson & Hays, or I. W. Hays, or the hire of the negro, Peyton, in *discharge of said note or any part of the same*.

These instructions, therefore, should not have been given; they were calculated to mislead the jury, and for the giving of which the judgment of the court below must be reversed.

The other Judges concurring, the judgment below is reversed and this cause is remanded.

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McDONALD, Respondent, *vs.* HULSE, Appellant.

1. A. gave B. a bond bearing six per cent. interest, secured by deed of trust on a slave. Afterwards, without intending to abandon his lien on the slave, B. takes from A. a new bond, bearing ten per cent. interest, and gives up the old bond. *Held*, B., by this act, does not lose his lien on the slave. But in such case, the slave is only subject to a lien for the amount of the old bond, with six per cent. interest.

*Appeal from Platte Circuit Court.*

The opinion of the court sufficiently states the facts.

*Leonard*, for appellant, insisted that the new bond was *prima facie* a payment of the trust debt and not a mere change of security, and therefore extinguished the trust debt. *Hutchins v. Olcutt*, 4 Verm. 550. *Bank of Commonwealth v. Ray*, 7 J. J. Marshall, 272. *Curtis v. Ingham*, 2 Verm. 290.

If such was not the *prima facie* effect of the new bond, yet the evidence shows that this was the intention of the parties. At all events, the slave was only subject to the payment of the original debt, less the amount paid.

*Hayden*, for respondent.

RYLAND, Judge, delivered the opinion of the court.

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McDonald v. Hulse.

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In this case, the following facts are found by the record.

McDonald, in August, 1847, filed a bill in the Platte Circuit Court against Hulse, Burnes and Thornburg, to the following effect:

Burnes being indebted to McDonald, by his bond of 2d February, 1841, payable at ten months, for \$500, with six per cent. interest from date, did, by his deed of 4th October, 1842, convey two slaves to Thornburg, in trust to secure the payment of the debt, with authority to sell the property if the debt remained unpaid on 1st May, 1843.

Afterwards, on 2d June, 1845, the plaintiff, one of the slaves having died, for the purpose of better settling his debt, and without any intention of abandoning his lien on the surviving slave, took a new bond from Burnes, with one Light as security, of the 2d June, 1845, payable one day after date, for the principal and interest then due (\$686) with ten per cent. interest from date, and discharged the old bond, in lieu of which the new bond was given. The bill did not exhibit the new bond nor any copy, but exhibited a copy of the deed of trust, alleging the loss of the original. Afterwards, on 8th of April, 1845, Hulse purchased the slave embraced in the deed of trust from the original owner, Burnes, and has had possession since, claiming adversely to the trust deed. The prayer of the bill is to subject the slave in the hands of Hulse to the payment of the balance due plaintiff on the last bond.

The bill was taken for confessed against Burnes and Thornburg, after an order of publication against them as non-residents.

The answer of Hulse, who appeared and contested the plaintiff's case, insists that the new bond was received in payment of the debt secured by the deed of trust; that the plaintiff surrendered the old bond, and destroyed the deed of trust, and insists that he is a purchaser from Burnes and ought to be protected.

A replication was filed, and upon the hearing before the court, the plaintiff called two witnesses, who testified that



Burnes asked them, respectively, whether taking personal security for the debt would discharge the deed of trust; to which they replied, that it would not; but these gentlemen could not say whether this was before or after the taking of the new bond. This was the whole case on the part of the plaintiff, except the exhibits to his bill.

The defendant, on his part, (among other evidence) produced the two bonds, and proved that they were found among the papers of Burnes in Kentucky, after he himself had removed to Oregon. One of his witnesses (Downey) testified that he had a conversation with the plaintiff, when he was on his way to see Burnes in relation to the debt, after the death of the negro girl, embraced in the deed of trust, and enquired whether there were any liens on Burnes' other slaves, to which witness replied he thought not; and then he enquired into the pecuniary condition of Light, to which witness replied that he thought it was good. The plaintiff returned the next day and said he had taken Light as security for his debt, and that he preferred personal security to security of slaves, because he thought it less troublesome, and asked witness to keep a look out for him, and let him know if any danger should occur. That about a year afterwards, plaintiff went to see Burnes, after being advised by witness that there was danger, and, upon his return, remarked to witness that he had been put off by good words again, and said he had concluded to wait awhile longer.

Proof was also given that judgment had been recovered by the plaintiff on the last bond, and money was collected thereon in July, 1846, to the amount of about \$400, and paid to the plaintiff in satisfaction of the trust debt.

The court decreed for the plaintiff, in March, 1849, the payment of the balance of the last bond (less the money collected on the judgment, \$475) out of the proceeds of a sale of the slave, which was directed to be made, and for costs.

A motion for a rehearing was made and overruled, and the defendant, Hulse, appealed to this court.

The appellant, Hulse, questions the propriety of the decree of the court below, and contends that the court should have decreed that the act of complainant, in taking a new note for the original debt, secured by the deed of trust, with personal security, was a payment of the original note; or at least a substitution of a different and new security for the original debt, so as to destroy all lien on the trust property.

1. In looking into the facts of this case, as preserved on the record, it will appear that one of the slaves mentioned in the deed of trust executed by Burnes, the defendant, to Thornburg, the defendant, in order to secure the payment of the debt of Burnes to the complainant, had died; that the complainant, after the death of the slave, then sought to have his debt better secured, and took a new note with one Light as security. It appears that Burnes, the defendant, had made enquiry about the effect of the taking of a new note on the deed of trust, and was informed that it would not destroy the lien created by the deed; but there is some doubt, as regards the time when this enquiry was made, whether before or after the taking of the new note, with Light as security.

The record shows that the original note, payment of which was secured by the deed of trust on the slaves, was to bear six per cent. interest; and that when the new note, with personal security, was taken for the amount then due, it bore interest at ten per cent. On this last note, judgment had been obtained and some four hundred dollars had been made.

Hulse, the defendant, who purchased of Burnes the negro boy mentioned in the deed of trust, does not pretend that he was ignorant of the trust; that he was an innocent purchaser, without notice; but he relies, mainly, on the ground that the new note, with Light as security, was a payment of the original debt, and operated so as completely to extinguish the lien originally created by the deed of trust.

In the opinion of this court, the lien still remained on the negro boy. It was not the intention of the parties to annul or destroy it. The security of Light was in addition to that al-

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ready made by the deed, and was owing, no doubt, to the death of one of the slaves mentioned in the deed.

If it had been the design or intention of the parties to destroy the lien on the slave that was still living when the new note was taken, with Light as security, it could have easily been made manifest, by declaring so, in writing, or by ordering the trustee to mark on it that the lien was destroyed by the consent and agreement of the parties, or by any other of the various modes, showing the acts and designs of individuals. But, in all probability, this lien remaining on the surviving negro, might have been one of the means by which the defendant, Burnes, was enabled to give personal security and obtain longer indulgence.

There is no error, then, in the court below, in decreeing that the lien was still existing on the negro boy, and that the complainant had the right to pursue his lien and enforce it, though the boy was in the possession of Hulse, under purchase by him from Burnes.

But it is the opinion of this court, that the negro boy is subject only to the lien of the original debt, with six per cent., instead of the amount in the new note, with ten per cent.; that the new note neither destroyed nor increased the amount of the original liability. Therefore, so much of the decree as subjected the negro to the payment of the debt of the last note, with ten per cent., after deducting the payment on execution of the money already made, was, so far as regards the rate of interest, erroneous. The negro should have been considered as liable to the lien of the original debt, with six per cent. only. The deed of trust on the negro was to secure the payment of the debt, with six per cent., not ten per cent. This lien is not extinguished. The decree should have been for the complainant, enforcing the lien by sale of the negro boy, in order to make payment to the complainant of the amount of the original debt yet remaining unpaid, with six per cent. interest per annum.

The decree of the Circuit Court is, therefore, reversed, and

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the cause remanded, with directions to enter for the complainant a decree in pursuance of this opinion—the other Judges concurring.

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MILLER, Appellant, vs. MARTIN, Respondent.

1. A, sets fire to the stubble on his inclosure, and, without any negligence or default on his part, and by inevitable accident, it escapes and crosses over the open prairie to the inclosure of B, and burns his fence. *Held*, A, is not liable to an action for the damage.
2. *Query*, If the stubble is fired on Sunday?

*Appeal from Andrew Circuit Court.*

*Vories*, for appellant.

The action on the case for injuries to land can only be maintained for a malfeasance, misfeasance or nonfeasance, and the appellant has been guilty of neither. 1 Chitty's Plead. 7 Am. ed. 95, and note 206; also, page 150. Tidd's Practice, 4.

It being lawful for the appellant to burn the stubble and rubbish in his field, to prepare it for cultivation, he is not liable for any accident which might happen, unless he or his servants acted in a negligent or improper manner in the burning thereof. *Finley v. Langston*, 12 Mo. 120. *Stephens' Nisi Prius*, 1011, 1012. *Clark v. Foot*, 8 J. R. 421. *Panton v. Holland*, 17 J. R. 92, and cases there cited. *Livingston v. Adams*, 8 Cow. 175.

The case made out by the proof is not such wrongful setting out fire as is prohibited by our statute; nor is it a case of wrongful or negligent conduct, for which an action is maintainable at common law.

*Leonard*, for respondent.

1. The defendant was guilty of an illegal act, in setting fire to the combustible matter on his grounds *on Sunday*, and is liable for all injuries arising therefrom.

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2. The direct effect of the defendant's act was the destruction of plaintiff's property, and however different the law may be in criminal prosecutions, yet, when reparation is sought for the injury, it is quite immaterial as to the right of action, with what intent the act was done, or what the probabilities of the injury were, or what endeavors were used to arrest the injury. 1 Chitty's Plead. 147, 197, 205. *McAllister v. Hammond*, 6 Cow. 343. 2 Iredell, 207. *Hodges v. Weltberger*, 6 Monroe, 337. *Amick v. O'Hara*, 6 Blackf. 258. *Weaver v. Ward*, Hobart, 289. *Sheridan v. Bean*, 8 Met. 284. *Guille v. Swan*, 19 Johns. 381. *Newson v. Anderson*, 2 N. C. 42. 2 Green. Ev. sec. 224.

SCOTT, Judge, delivered the opinion of the court.

This was an action begun in 1847, by Martin, in his lifetime, against Miller, for damages. The declaration contained two counts, both at the common law.

It appears that Martin owned a farm about half a mile north of the defendant's, and between them there was an open prairie. The defendant had begun to plow a field, preparatory to the sowing of oats, but, in consequence of the quantity of stubble and other such matter upon the ground, he was obliged to desist. In order to remove the obstacles which impeded his plowing, he put fire to them. There had been run, sometime before, around the land thus fired, furrows, making the width of a rod. The defendant and a servant boy remained to watch the fire. The wind rose high about the middle of the day, although it was calm in the morning. In the absence of the boy, who had gone for a drink of water, the fire escaped and was communicated to the plaintiff's fencing and burned a quantity of his rails. The court refused an instruction asked by the defendant, to the purport, that, if he had used due diligence in firing his land, and, notwithstanding, the fire had escaped and burned the plaintiff's rails, without the least fault or neglect on his part, they will find against the plaintiff. And, at the instance of the plaintiff, instructed the jury, that if the defendant himself, or by another, set out

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fire which ran to, and communicated with, and burned the fence of the plaintiff, they will find for him. Otherwise they will find for the defendant. There was a verdict for the plaintiff, and, after an unsuccessful motion for a new trial, the cause was brought to this court by appeal.

Some confusion was produced in the argument of this cause, by reading cases in which the only point involved was the form of the action for the injury committed; whether it should be trespass *vi et armis*, or an action on the case. The propriety of the application of the principle, whose aid is sought to shield the defendant from damages for the act complained of, does not depend on the circumstance whether the injury was direct or consequential; it is equally applicable, whether the remedy for the alleged wrong is trespass or case. It is conceded, that this is an action at common law, uninfluenced by any statutory provision.

1. It must be acknowledged that it is a settled principle of our law that, if a party be in the prosecution of a lawful act, an action does not lie for an injury resulting from an inevitable or unavoidable accident, which occurs without any blame or default on his part. One of the earliest cases on this subject is that of *Weaver v. Ward*, reported in Hobart, fol. 134. Two companies of trained soldiers were skirmishing for exercise, and a soldier of one company, in firing his piece, wounded a soldier of the other company. On demurrer to declaration in trespass for this injury, the court gave judgment for the plaintiff, but declared it would have been otherwise if it had been utterly without the defendant's fault, as if the plaintiff had run across his piece when it was discharging; or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt. This doctrine is recognized in the subsequent cases, and although difficulties have arisen in its application, its correctness has never been contested. Chitty, 149. *Wakeman v. Robinson*, 8 Eng. Com. Law Rep. *Davis v. Saunders*, 18 Eng. Com.



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Law Rep. 437. The cases cited by the plaintiff do not, as we conceive, impugn the principle above stated. That of *McAllister v. Hammond*, 6 Cow. is put expressly on the ground of negligence, and the real point involved was, whether the remedy should have been trespass or case. The same remark is applicable to the case of *Hedges v. Wellberger*, 6 Mon. 337. The case of *Amick v. O'Hara*, 6 Blackf. 258, was for chasing a horse out of a field with a large fierce dog, by which the horse was injured, though not by the dog. The question of intent was considered in this case. For an injury caused by the want of due caution, there is no doubt that a party will be liable to an action, without any regard to the intent with which the injury was done. It may have been entirely unintentional and against his will, and a source of mortification, regret or sorrow; yet, if it is caused by negligence, the party will be liable to an action. Whether that action should be trespass or case, will depend on the circumstances attending the commission of the act, and is a matter of indifference in the application of the principle involved in this case. The case of *Sheridan v. Bean*, 8 Met. 284, was an action for a trespass committed by cattle which had escaped from their inclosure. As by the law of Massachusetts, the owner of cattle is obliged to confine them, so that they cannot trespass on the grounds of others, the foundation of the action must have been the negligence of the owner of the cattle, or of those to whose care they were entrusted.

The case of *Guille v. Swan*, 19 John. Rep. 381, was an action against an aeronaut, for an injury done to a garden by the crowd, which was attracted to the balloon at its descent. The court said that, although the ascending in a balloon is not an unlawful act, yet it is certain that the aeronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard, and he did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such

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circumstances, would ordinarily and naturally draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation, all this must have been foreseen by him and he must be responsible for it. The case of *Newson v. Anderson*, 2 N. Car. Rep. December term, 1841, merely determines that if the owner of land adjoining that of another fells a tree standing on his own land, which falls on the land of the adjoining proprietor, he is guilty of a trespass. The paragraphs referred to in Greenleaf all relate to the distinction between actions of trespass and case. But, in the same book, secs. 85 and 94, clearly maintain the principle above stated. It is there said, the plaintiff must come prepared with evidence to show either that the intention was unlawful or that the defendant was in fault; for, if the injury was unavoidable and the conduct of the defendant was free from blame, he will not be liable. Thus, if one intend to do a lawful act, as to assist a drunken man or prevent him going without help, and, in so doing, a hurt arise, it is no battery. So if a horse, by a sudden fright, runs away with his rider, not being accustomed so to do, and runs against a man; or, if a soldier, in discharging his musket, by lawful military command, unavoidably hurts another, it is no battery; and in such cases, the defence may be under the general issue. But to make out a defence under this plea, it must be shown, that the defendant was free from all blame, and that the accident resulted entirely from superior agency. Thus, if one of two persons fighting unintentionally strikes a third, or if one uncocks a gun, without elevating the muzzle or other due precaution, and it accidentally goes off and hurts a looker on; or if he drives a horse too spirited, or pulls the wrong rein, or uses a defective harness, and the horse taking fright injures another, he is liable for the battery. But if the injury happened by unavoidable accident, in the course of an amicable wrestling or other lawful athletic sport, if it be not dangerous, it may be justified. If it were in a boxing match or fight, though by consent, it is an unjustifiable battery, the proof of consent being admissible

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only in mitigation of damages. The last case we will notice on this head, is that of *Hay v. The Cohoes Co.*, 2 Comstock, 159. The defendants, a corporation, in digging a canal upon their own land, for purposes authorized by their charter, found it necessary to blast rocks with gunpowder, and in doing so, the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. Under these circumstances, it was held, that the defendants were liable for the injury, although no negligence or want of skill, in executing the work, was alleged or proved. The case now under consideration is not parallel with the one cited, which rather resembles the case of *Gregory v. Piper*, 17 Com. Law Rep. 456. A master ordered a servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the same. The servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall. It was held that the master was liable in trespass. Judge Parke, in delivering the opinion of the court, observed that "the defendant must be taken to have contemplated all the probable consequences of the act, which he had ordered to be done, and one of those probable consequences was, that the rubbish would touch the plaintiff's wall." The case is also analogous in principle to that before cited, relative to the aeronaut, who ascended in the balloon. The scattering of the fragments of rock in all directions, beyond the control of the party, was a natural consequence of the blasting, and must have been foreseen as probable. The rise of the wind, in the case under consideration, was not a natural or probable consequence of setting fire to the stubble, and could not have been foreseen, though such an accident was possible, and great fires may cause the wind to rise.

The case of *Turbervil v. Stamp*, 1 Salkeld, 13, was for negligently keeping fire in a close, whereby the plaintiff's grass was consumed. After verdict for the plaintiff, it was objected that the party was liable only by the custom of the realm for fire in his house or curtilage, which are in his power.

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But the objection was disallowed ; for the fire in his field is his fire as well as that in his house, and he made it, and must see it does no harm, and answer the damage if it does. Every man must use his own, so as not to hurt another ; but if a sudden storm had risen, which he could not stop, it was matter of evidence, and he should have shown it.

The custom or law, referred to in the above case, was repealed by Stat. 6 Ann, chap. 31, which enacts, " that no action shall be maintained against any one in whose house or chamber any fire shall accidentally begin."

2. No question was raised in the court below, as to the stubble being set on fire on Sunday.

The other Judges concurring, the judgment will be reversed and the cause remanded.

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McCABE, Plaintiff in Error, *vs.* WORTHINGTON, Defendant in Error.

1. During the pendency of a suit under the act of congress of May 26th, 1824, to try the validity of a claim to land, the land claimed was not reserved from entry and sale, unless the claimant had filed a notice of his claim with the recorder of land titles prior to July 1st, 1808. A person obtaining a patent for the land from the United States after the institution of the suit and before a final decree in favor of the claimant, will hold it against a patent issued upon the final decree.

*Error to Audrain Circuit Court.*

*Frémon and Reber*, for plaintiff in error.

1. The title of Soulard, under whom plaintiff claims, before the decree of confirmation, consisting of a concession and survey, was such a title as was protected by the treaty of cession and by the law of nations. This is well settled by judicial decisions, independent of congressional legislation. *Delassus v. United States*, 9 Peters, 117. *Chouteau's heirs v. same*, ib. 137. *Soulard's heirs v. same*, 10 ib. 105. It could be sold under execution. *Landes v. Perkins*, 12 Mo. 259.

2. It may be conceded that, prior to the passage of the act of 1824, Soulard's claim was barred, by the act of 1807. But this bar, which has been considered as sustainable only as a statute of limitations, did not destroy the equity of the claim, and as soon as the bar was removed by the act of 1824, his title was restored to its standing as property protected by the treaty.

3. From the first and second sections of the act of 1824, it will be seen that the intent of the law was to bring all parties interested in the land before the court, and, by a final decree, settle the title between them; and, if it were found that the title of the petitioner was protected by the treaty, and otherwise valid, to decree a confirmation of it. The proceedings under the act were adversary, bringing all parties interested before the court, and giving them power to contest the petitioner's claim. In this respect, it differed from the proceedings under the supplemental act of May 24, 1828, which the court, in *Barry v. Gamble*, 3 Howard, says were *ex parte*, on which fact the court seems to lay some stress.

4. The decree of the Supreme Court, declaring Soulard's title to be valid under the treaty, the law of nations, &c., and confirming it, had the effect to give it the standing and character of a legal title from the date of the passage of the act of 1824, or, at least, from the date of filing the petition for confirmation. This is the clear intent of the act, and the legal effect of the decree is, to accomplish and perfect that intent. In construing statutes, when the intention of the legislature is ascertained, the courts are bound to give it effect, whatever may be their opinion of its wisdom or policy. *Dwarris on Statutes*, 7 Law Library, page 40 and following. The confirmation is more than a mere grant; it is a confirmation in the strict sense of the term, and invested the petitioner, from the time he asserted his claim under the law, with the legal title which the government acknowledged itself to have held in trust for him. It, therefore, binds, and is conclusive on the government and on all persons claiming under it, by title origi-

nating subsequent to the institution of the proceedings by Soulard.

5. The intention of the act of congress was to invest the claimant with the legal title to lands, to which he confessedly had an equitable title; and by necessary implication and intendment, the land was reserved from sale or other disposition, until the claimant's title was definitively disposed of. Indeed, this is enacted, not in terms, but in effect, by the fifth section, which declares that claims not prosecuted under this act within two years, shall be forever barred; and the seventh section, which enacts, that claims, barred by the fifth section, shall be taken to be public land, and subject to sale accordingly. It is no answer to this construction of sections five and seven to say that they refer to claims, notice of which had been filed under the act of 1805, and other subsequent acts, because these sections intended to furnish a rule for the government of *all* claims coming within the scope of the act, and not merely for a part of them.

The theory of the act is, that claims coming within its purview are reserved from sale by it. Some of its provisions will have to be rejected as meaningless, unless that theory is sustained, and the benefit intended by the law cannot be realized, unless that construction is adopted. A thing within the intention of the makers of a statute, is as much within the statute as if it were in the letter. Dwarris, same vol. p. 41.

6. Section eleven of the act was only intended to protect purchasers and others, claiming under the government by a title issued prior to the filing of the petition by the claimant.

7. The section in the act of May 24, 1828, supplemental to the act of 1824, U. S. Statutes at large, vol. 4, p. 298, which dispenses with making adverse claimants parties, and enacts that confirmations under the act should be taken to be only a quit claim on the part of the United States, strengthens our construction of the act of 1824.

*Broadhead*, for same.

1. The act of May 26th, 1824, operated to reserve from



sale the land included within the limits of the claim of Antoine Soulard, from the time of the filing of the petition for confirmation, and all sales made by the government thereafter are void. If this were not manifest from the first section, the seventh section shows, conclusively, the intention to reserve the lands from sale, during the process of adjudication. The act of 1824 being repugnant to the act of 1807, and referring to the same subject matter, operates to repeal it. The case of *Barry v. Gamble*, 3 Howard, 55, expressly decides that the act of 1824 removed the bar created by the act of 1807, in case of a failure of the claimant to file a notice of his claim prior to July 1st, 1808.

2. The proceeding under the act of 1824, was a judicial and not a political one. The claimant was not dealing with the government in its political and sovereign capacity, but prosecuting his claim against the government as a party defendant, and is entitled to the protection of all the rules and principles which govern the rights of parties litigant. The maxim, *pendente lite nihil innovetur*, therefore applies.

3. The equitable title of the claimant being recognized by the act of 1824, the confirmation by the Supreme Court, vesting in him the legal title, relates back to the time of filing the petition, and cuts out all titles originating afterwards.

*Bogy*, for same, also filed a brief.

*Anderson*, for defendant in error.

Soulard's claim not having been filed with the recorder of land titles in St. Louis, prior to July 1st, 1808, the same was subject to sale as other public lands.

The act of congress of May 26th, 1824, under which Soulard's claim was confirmed, did not reserve from sale the land covered by said claim; and the entry of the defendant having been made according to law, and prior to the plaintiff's confirmation, the defendant has the better title.

The act of May 26th, 1824, was no recognition, on the part of the United States, of title, either inchoate or perfect in said Soulard; nor did the institution of a suit under said act, ope-

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rate to prevent the United States from selling, previous to the confirmation.

The seventh section of the act of 1824, relied on by the plaintiff in error, was only intended to operate on that class of claims, notice of which had, in due time, according to law, been filed with the recorder of land titles, and which were reserved from sale by the acts of March 3d, 1811, and February 17th, 1818.

The eleventh section of the act expressly declares that no claimant under the act shall have any lands decreed to him that have been sold by the United States.

The principle, *pendente lite*, &c., does not apply.

SCOTT, Judge, delivered the opinion of the court.

This was an action of ejectment, begun in the Pike Circuit Court, which, by a change of venue, was taken to Audrain county, where, on a trial, the plaintiff submitted to a nonsuit, and after an unsuccessful application to set it aside, brought his cause, by appeal, to this court.

The plaintiff's title rested on a concession by the Spanish government in 1796, which was confirmed by a decree of the Supreme Court of the United States, on the 21st January, 1836, on an appeal from the District Court of Missouri, which exercised jurisdiction of the subject matter, under the provisions of the act of congress of May 26th, 1824, entitled "an act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas, to institute proceedings to try the validity of their claims." The petition was filed by the claimant, Antoine Soulard, on the 22d August, 1824. In January, 1825, an amended petition was filed by Antoine Soulard, who afterwards died, and on the fourth Monday of March following, the proceedings were revived in the name of the widow and heirs of said Soulard, and such proceedings were had, that a decree was rendered against the petitioners by the District Court, on the fourth Monday of December, 1825, from which an appeal to the Supreme Court of the United States was taken within one year from its rendition,

where, on the 21st January, 1836, the decree of the District Court was reversed and the claim of the petitioners was confirmed, for all the land claimed, except that which had been sold by the United States before the filing of the petition in the case. In pursuance to this decree, the land claimed and confirmed was surveyed, and the survey returned to the commissioner of the general land office, on which, on the 22d December, 1845, a patent was issued to the petitioners, under whom the plaintiff claims. The land sued for is comprehended within the limits of the survey, and in the patent to Soulard's widow and heirs. No notice in writing, stating the nature and extent of his claim, was ever delivered by Soulard to the recorder of land titles, under any of the acts of congress in relation to that subject. The defendant was in possession of the premises in controversy, and their yearly value was estimated at eighteen dollars.

The defendant's title rested on patents from the United States, in the year 1836. These patents were based upon entries made in the year 1834, after the filing of Soulard's petition in the District Court, in August, 1824, and before the final decree of the Supreme Court of the United States, in January, 1836.

The court refused the following instructions. asked by the plaintiff:

1. That the deed of confirmation, made by the Supreme Court of the United States, on the 21st day of January, 1836, to Julie Soulard, widow, and James G. Soulard and others, heirs of Antoine Soulard, deceased, relates back to the time of filing the petition for confirmation, and passes to the confirmees the title to the land thereby confirmed, so as to cut out all titles and claims thereto, originating after the filing of said petition.

2. If the jury believe from the evidence, that the land sued for was patented by the United States, on the 22d day of December, 1845, to the widow and heirs of Antoine Soulard,

deceased ; that such patent was issued for land surveyed for said patentees, in pursuance of a decree of confirmation, made by the Supreme Court of the United States, and that such decree of confirmation was founded on a petition for confirmation, filed in the United States Court for the district of Missouri, on the 22d day of August, 1824, such patent conveyed to the patentees a better title to the land sued for than that derived from an entry of the same, made after the said 22d of August, 1824, or from a patent issued on such entry.

3. If the jury believe from the evidence, that Antoine Soulard, on the 22d day of August, 1824, petitioned the District Court of the state of Missouri for the confirmation of his title to a claim for 10,000 arpens of land ; that said Antoine Soulard died, and the suit was revived and prosecuted in the name of his widow and children ; that said District Court decreed against the said claim ; that said suit was appealed to the Supreme Court of the United States within one year from the time of the rendition of said decree, by the District Court ; that said Supreme Court afterwards decided in favor of the said claim, and, by a decree, confirmed the same to said widow and heirs ; that the surveyor of public lands for the state of Missouri, caused the land specified in said decree to be surveyed for said confirmees—if the jury find these facts to be true, then the said widow and heirs of Antoine Soulard had, by virtue thereof, a better title to the land included in such survey, than the defendant can have to any part of it, by virtue of an entry made after the said 22d of August, 1824, or by virtue of a patent issued on said entry.

4. The title under the confirmation of the Supreme Court of the United States to the representatives of Antoine Soulard, is a better title than that of the defendant.

5. The act of May 26th, 1824, passed by the congress of the United States, reserved from sale the lands included within the bounds of all claims of the character embraced within the provisions of the first section of that act, from the time of the

filing of the petition for confirmation of such claims, in the District Court of Missouri, until such time as said claims should be finally decreed against the claimants.

6. Any entry of lands made within the limits of any claim of the character embraced within the provisions of the first section of the act of May 26th, 1824, after the filing of the petition of the claimant in the District Court, as provided for by said act, and before said claim shall be finally decided against the claimant, is a void entry, and the patent issued thereon is a void patent.

And gave the following instructions asked by the defendant :

1. If notice of the Soulard claim was not filed with the recorder of land titles in St. Louis, prior to the 1st day of July, 1808, then said claim was not by law reserved from sale, and if not reserved from sale by law, was subject to sale as other public lands.

2. If Soulard's claim was not reserved from sale, then the entry of the defendant, if made according to law, being older, is a better title than the plaintiff's confirmation.

3. The patent of the defendant is *prima facie* evidence that his entry was regular and lawful.

4. The act of congress of 26th May, 1824, under which Soulard's claim was confirmed, did not reserve from sale the land covered by said claim, and any sale of such land, regularly made prior to the confirmation, conveys to the purchaser a better title than said confirmation, such claim not having been filed with the recorder prior to July 1st, 1808.

5. The commencement of a suit by Soulard, in the United States Court, for the purpose of obtaining a confirmation of his claim, did not operate as notice of his claim, so as to affect a title otherwise regularly obtained from the United States ; and sales of such land made after the commencement of his suit stand upon the same ground as if made before such suit was commenced.

1. In determining this cause, we have given full consideration to the well established principle, and one which is found-

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ed on indispensable necessity, that the purchase of the subject matter in controversy, *pendente lite*, does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation. Nor have we forgotten, that it was a maxium of the common law that, *pendente lite nihil innovetur*. It seems to us, that the question involved in this controversy steers clear of the principle stated, and its solution is to be found in the proper construction of the various acts of congress in relation to the subject.

We are not aware that this question has ever been determined by the courts of the United States, though intimations may be found in some of the reports, that, as between the federal government and the claimants under the act of 26th May, 1824, the confirmation would relate back to the filing of the petition, and give title to the lands described in it. We acknowledge the justice and propriety of this rule, when applied to the United States, but cannot recognize its justice when sought to be extended to innocent purchasers.

The act of congress of the 26th May, 1824, authorized the institution of proceedings to try the validity, as well of those claims of which notice had been delivered to the recorder, as those of which no notice had been given. The claim of Soulard was of this latter class. In pursuance to the acts of congress of March 3d, 1811, section 6, and of the 17th February, 1818, and the treasury order of Mr. Crawford, of the 10th June, 1818, lands of the class first above-mentioned were reserved from sale until the final decision of congress thereon. Those of the latter class, by the act of 3d March, 1807, section 5, in consequence of no notice of them having been delivered to the recorder of land titles, prior to the 1st July, 1808, so far as they were derived from or founded on any act of congress, were barred and void from and after that period. The act of the 24th May, 1828, amendatory of the act of 26th May, 1824, declares that the confirmation had, by virtue of said act and the patents issued thereon, shall operate only as a relinquishment of title on the part of the United States, and



shall in no wise affect the right or title, either in law or equity, of adverse claimants of the same land.

The authority of congress to enact the law of the 3d March, 1807, making all claims void of which notice should not be delivered prior to the 1st July, 1808, has never been successfully controverted. The propriety and policy of such laws are obvious. The claim, then, of Soulard, at the date of the act of 1824, had no legal existence. It was as though it had no being. The United States were under no obligation, moral or political, to make any provision for its recognition or confirmation. It was forfeited by reason of its owner failing to give notice of it, within the time prescribed by law. That act conferred a gratuity, and the claimants under it, especially those in the class of Soulard, stood upon the same ground occupied by any other applicant for the bounty or favor of congress. The land he claimed was, in every sense of the word, public land, liable to sale and entry as other public lands. So sensible was the party of this, that, in his petition to the District Court, he did not pretend to claim that portion of his land which had been entered prior to the act of 1824. He expressly excepted it. The act of 26th May, 1824, establishing the land office at Palmyra, within which district the land in controversy was situated, expressly subjected all public lands to sale within the limits of the district thereby created. If an application is made to the bounty of the government, desiring a tract of land, and before the application is granted, the government sells the tract solicited, for a valuable consideration, to a purchaser, without any other notice than is implied from the fact that an application for the same land has been made at a great distance from the place of sale, on what principle can the recipient of the bounty claim the land of the purchaser, when, by the terms of the gift, he is told that if the land granted has been sold, he shall take lands elsewhere? 11th sec. act 1824. Can it make any difference that the grant is made in the form of a judicial proceeding? Is it not an

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obvious perversion, to apply to such a procedure the maxim, *pendente lite nihil innovetur*?

The seventh section of the act of May 26th, 1824, enacts that any claim tried under the provisions of this act, which shall be finally decided against the claimant, and that if any claim cognizable under the act shall be barred by virtue of any of the provisions therein contained, the land specified in such claim shall forthwith be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public land, in the same district. This section is supposed to contain an implied reservation of all lands included in any petition filed under the provisions of the act. When it is recollected, that there were two classes of claims embraced by the act, one of which had been reserved from sale for a great number of years, and another which had been regarded as public lands, subject to sale for nearly fifteen years, there can be no ground for this supposition. This section, we conceive, applies to those lands which had been reserved from sale. There was no necessity for a provision for the sale of those lands, of the claims to which, no notice had been given. They had never been reserved by any law or regulation of any of the departments, while those, of which notice had been given, had been reserved from the year 1811. On the expiration of the act of 1824, which was a temporary one, lands of the class in which this was included would have been subject to sale without this provision, as they had been regarded and treated as public lands for a number of years, on which no reservation whatever existed.

When the nature of the plaintiff's claim is considered, regarding his confirmation as a mere gratuity, as it is, there is no reason nor justice for making the words "shall have been sold by the United States, or otherwise disposed of," in the 11th section of the act of 1824, relate to the filing of the petition of the claimant, rather than to the date of the confirmation of the claim. Indeed, the language of the section would seem to

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convey this idea: The words are, "that if, in any case, it should so happen, that the lands, tenements or hereditaments, *decreed* to any claimant, under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, it shall and may be lawful for the party interested to enter the like quantity of land." The act does not say, that if any *claim*, under the provisions of the act, shall have been disposed of, but if any land *decreed* shall have been sold, showing that the sale referred to the time of the decree, and not to the time of filing the petition.

Judge Ryland concurring, the judgment of the court below will be affirmed.

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EVANS, Plaintiff in Error, *vs.* KING, Defendant in Error.

A. assigns to B. money due him from the United States as pay for services in the war of the revolution. A. dies and C., his administrator, receives the money from the government. *Held*, B. cannot maintain an action against C. for the money without having first made a demand.

*Error to Callaway Circuit Court.*

The facts sufficiently appear in the opinion of the court.

*Ansell*, for plaintiff in error, contended that the action for money had and received was properly brought. *Wiseman v. Lyman*, 7 Mass. 286. Chitty on Contracts, p. 605, note 1. *Hull v. Marston*, 17 Mass. 579. *Clafin v. Godfrey*, 21 Pick. 6. *Mason v. Waite*, 17 Mass. 562. *Eddy v. Smith*, 13 Wend. 490. *Kane v. Paul*, 14 Pet. 33. *De Valengin's Administrators v. Duffy*, 14 Pet. 282. *Moses v. McFerlan*, 2 Burrows, 362. Chitty on Pleading, 384, 385, 386, top paging.

King was liable in his individual as well as in his representative character. 14 Pet. 33 and 282. *Pease v. Barber*, 3 N. Y. T. R. 266.

By the deed of gift from Jesse Evans, plaintiff and Joseph Evans became entitled to the money, and the collection thereof, by King, was in his own wrong. See "act for the relief of certain surviving officers and soldiers of the army of the revolution," approved May 15th, 1828, vol. 4 Stat. U. S., p. 269, and supplementary act, approved June 7th, 1832. "An act making provision for the payment of pensions to executors and administrators of deceased pensioners in certain cases," approved June 19th, 1840, 5 U. S. S. p. 385. "An act to provide for liquidating and paying certain claims of the state of Virginia," approved July 5th, 1832, 4 U. S. S. p. 563. Therefore, no demand or notice before suit was necessary. *Lent v. Padelford*, 10 Mass. 244. *Booth v. Barnum*, 9 Conn. 286. *Peters v. Goodrich*, 3 Conn. 150. 7 ib. 334. Story on Contracts, p. 406, sec. 667. *Jones v. Henry & Boggs*, 3 Littell, 46. *Linn v. McClelland*, 4 Dev. & Batt. 458. *Perkins v. Smith*, 1 Wilson, 328. *Cooper v. Chitty*, 1 Burrows, 20. *Parker v. Godin*, 2 Strange, 813. 12 Modern, 334. 14 Peters, 282. 1 Story's Eq. p. 402, sec. 400, a. See "Fraudulent Conveyances," Stat. Mo. 1825 and 1835.

The money due Jesse Evans, under the act of July 5th, 1832, was assignable. 2 Story's Eq. secs. 1040, 1047, 1056, 1057.

A deed of gift is sufficient to pass personal property to the donees without actual delivery of the property. *Bank's Administrator v. Marksberry*, 3 Litt. 275. *Inlow v. Thomas*, 6 Mon. 74. *Horn v. Gartman*, 1 Branch, 63. *Grangiac v. Arden*, 10 John. 293. 2 U. S. Dig. Suppl. p. 84, sec. 44, p. 85, sec. 72, p. 86, secs. 75, 76, 85, 86, 88, p. 83, sec. 25. *Linnendoll v. Doe*, 14 Johns. 222.

Voluntary conveyances are good except against creditors. 1 Story's Eq. secs. 371, 353, 354, 355, 356. *McCutchen v. McCutchen*, 9 Porter, 650. *Abbot v. Williams*, 2 Brevard, 38. *Elam v. Keen*, 4 Leigh, 333. 1 Gallison's Rep. 419. *Hayden*, for same.

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*Leonard and Sheley*, for defendant in error.

The money due from the government for half pay did not pass by the deed of assignment, because, 1. It was an imperfect gift, a voluntary assignment, not sufficient of itself to pass the money, and being without value, is not entitled to aid from a court of equity. Story's Eq. secs. 706, 798, 973, 988, 1040. *Edwards v. Jones*, 7 Simons, 325. 1 Mylne & Craig, 226. *Colman v. Sarrel*, 1 Ves. Jr. 50. *Ex parte Pye*, 18 Ves. 140. 2. The alienation of such a provision is against the policy of the law by which it is granted. Story's Eq. sec. 1040.

If an equitable right to the money vested in the plaintiff by the deed of assignment, the administrator's was the hand to receive it, and the money having come lawfully into his possession, a demand before suit was necessary. *Ferris v. Paris*, 10 Johns. 284. *Taylor v. Bates*, 5 Cow. 378. At least, notice of the plaintiff's right was necessary.

If the defendant is liable at all, he is liable in his representative capacity, and not personally. *Congrove, Administrator, v. Sanders*, 3 J. J. Marshall, 575. *Frye v. Lockwood*, 4 Cow. 456. *Ripley v. Gelston*, 9 Johns. 201. *Sadler v. Evans*, 4 Burr. 1984. *Townson v. Wilson*, 1 Camp. 397.

GAMBLE, Judge, delivered the opinion of the court.

Evans brought an action against King for money had and received upon the following case :

Jesse Evans, the father of the plaintiff, who had served in the revolutionary war, as an officer in the "Illinois Virginia regiment," executed a deed of gift, dated the third day of December, 1834, by which he conveyed to his sons, Joseph Evans and the plaintiff, three-fourths of his claim for land, to which he was entitled by reason of his services as such officer, and "all the money due me from the state of Virginia and the government of the United States, as pay, half pay, or in any other way that may be due to me for the said services in the war of the revolution, as an officer, by virtue of any law or

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laws, resolution or resolutions, either by the legislature of Virginia or the congress of the United States." The consideration stated in this instrument is "love, good will and affection." After this instrument was made, and after the donees had received some money under it, Jesse Evans died, and the defendant, King, became his administrator. As such administrator, the defendant received from the government of the United States the sum of \$2976 66, on account of the half pay of the intestate, from 1836 up to the time of his death. This action is brought to recover the money so received. The case, in the court below, turned upon the necessity of a demand before the commencement of the action, but the questions discussed here involve the merits of the case, and, so far as it now appears necessary, the merits will be decided.

The present action is designed to enforce against the representative of Evans, the voluntary gift made by the instrument executed in favor of his sons, by a recovery of the money received by his administrator.

The money was received from the government of the United States by the administrator, King, under the act of congress of 5th July, 1832, 4 Stat. U. S. 563, which provided for liquidating and paying certain claims of the state of Virginia. The second section of the act directs payment to be made to the state of Virginia, from the treasury of the United States, of the amount of judgments which had been recovered against that state, in favor of the officers or representatives of officers of certain regiments and corps therein mentioned. The third section provides that the secretary of the treasury shall adjust and settle the claims for half pay of the officers of the same regiments and corps, who had not prosecuted their claims to judgment, but for which the state of Virginia would be bound upon the principles of the half pay cases decided by her court of appeals.

Under this act, Jesse Evans, as a captain, was entitled to receive from the government of the United States, \$240 a year, as his half pay for life. There is nothing in the act that pro-



hibits the transfer of the right to this allowance of half pay, nor any direction as to the persons who shall receive it, in case of the death of the officer. Whether there is any provision in the act of the legislature of Virginia, affecting the question of succession to the rights of a deceased officer, we have not now the means of ascertaining.

We proposed, at first, deciding the questions discussed at the bar, which involve the merits of this controversy, but subsequent reflection has produced doubts whether those questions are presented upon the present record as fully and fairly as they might be. It is incidentally mentioned, that the assignees of Jesse Evans have received a considerable sum of money from the government, under the deed of their father, but it does not appear whether the government recognized them as assignees and paid the money to them as their own, under the deed of their father, or whether it was received from the government in the name of their father, Jesse Evans. The fact that the government recognized their right to the money under the deed of their father, and paid it to them, may have great influence in determining the questions now presented by the defendant in opposition to their present claim. If they were treated by the government as entitled to the money under the deed, or if, according to the practice of the department, they could have received the money, claiming it under that deed, it would be difficult to resist the conclusion that the transfer was in itself complete and their right perfect. In the absence of such evidence, the defendant, the legal representative of Jesse Evans, is shown to have received the money.

1. Whatever may be the right of the plaintiff to recover the money from the defendant, we will take the payment to have been rightly made in the first instance to the administrator by the government, unless the contrary is shown, and then we hold, that before the person who received the money as administrator, was sued by the plaintiff, there should have been a demand made upon him for its payment. The want of a demand appears to have been the ground of decision in the Cir-

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cuit Court, upon which the plaintiff suffered a nonsuit. That decision, upon the state of the evidence, was correct, and the judgment is affirmed.

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HENRY BEST, Appellant, *vs.* JOHN BEST, Respondent.

1. A. commenced an action against B. before a justice of the peace, on an open account, amounting to more than ninety dollars. On the trial, B. secretly asked the justice if he had jurisdiction, to which the justice replied that he had, as A. did not claim more than ninety dollars. B. then went into the trial, on which A.'s attorney expressly stated that he did not claim more than ninety dollars, and judgment was rendered for less than that sum. *Held*, the judgment and execution issued thereon are not void.

*Appeal from Andrew Circuit Court.*

SCOTT, Judge, delivered the opinion of the court.

This was an action of trespass, begun by Henry Best against John Best, for taking and selling his property under a void judgment and execution, as it was alleged. John Best, the defendant below, obtained a verdict.

It appears that a suit was begun in a justice's court by John Best against Henry Best, on an open account, which amounted to the sum of \$106 87½. On a trial, John Best obtained a judgment for \$79 17, debt and costs. Some days afterwards, this judgment was set aside by the justice and a new trial ordered. On the second trial, there was a judgment for John Best for \$43 37½ debt and for costs. This last judgment was taken by appeal to the Circuit Court, where it was set aside, and the justice directed to issue an execution on the first judgment rendered by him. Under this execution, the property of Henry Best was taken and sold, which gave rise to this suit. On the trial in the justice's court, Henry Best enquired, secretly, of the justice, if he had jurisdiction of the cause? He was answered that he had, as the plaintiff did not claim more than ninety dollars. He then entered into the trial, and the plaintiff's attorney expressly stated that he claimed no more than ninety dollars.

The court refused instructions asked by Henry Best, to the effect that the execution and judgment were no justification to the party defendant, and that, under the facts of the case, he was entitled to recover, but instructed the jury that the party was justified.

Justices' courts are not courts of record. The rules applicable to proceedings in courts of record have not been applied to them. If justices' proceedings were made to conform to a standard erected on principles governing courts, which are presumed to understand all the forms, and whose officers have made the law their study and profession, they would become intolerable evils in our community, as they would only prove snares to the unwary, subjecting them to actions for causes which they could not prevent, and for which they should not be responsible. All that is required of such courts is, that they do substantial justice between the parties, and when this has been done, the courts of general jurisdiction will not be astute in hunting up objections which may overthrow their proceedings, and subject those who have employed them to actions which have no foundation in justice. Such a course would make these courts a curse to the community, instead of a convenience, and must necessarily drive every suitor from them. There is nothing in the case of *Robinett v. Nunn*, 9 Mo. Rep. 246, which stands in the way of an affirmance of this judgment. The offer to abandon a part of his set-off was not made by the defendant in that case, until it was in the Circuit Court. It was intimated that such an offer, if made in the justice's court, would have been effectual. In the cause under consideration, it sufficiently appears that the justice had jurisdiction of the subject matter; that the trial was for a sum not exceeding ninety dollars; that nothing more was claimed; that the justice was authorized to enter a credit on the claim, and his failure to do so cannot effect the regularity of his proceedings, to the prejudice of the defendant.

The other Judges concurring, the judgment will be affirmed.

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Samuel v. Withers.

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## SAMUEL, Plaintiff in Error, vs. WITHERS, Defendant in Error.

1. The deposition of a witness has been taken in a suit and remains on file unsuppressed. *Held*, on the trial of the suit, the party cannot read in evidence a deposition of the same witness, taken in a former suit between the same parties, unless he has filed it in the suit in which he proposes to read it, or has given the opposite party notice that he intends to use it.
2. A., as security of B., signs a note payable to C. Usury, which B. has contracted to pay C. is included in the amount on the face of the note. *Held*, the omission to disclose this fact to A. will not operate to discharge him.

*Error to Boone Circuit Court.*

The opinion of the court contains a sufficient statement of the facts.

*Gordon and Hayden*, for plaintiff in error, insisted,

1. That the deposition of Bristow should have been excluded, because he was an interested witness; because it had been taken in another suit in which he was a party to the record, and had not been filed in this cause before it was read to the jury; because the evidence it contained was irrelevant; and because the deposition of the same witness had been taken in this cause, and was then on file and not suppressed.

2. That, even if usury had been proved, defendant was, nevertheless, bound to pay the money sued for in this action, or at least, the sum of money borrowed by Bristow. 14 Verm. Rep. 258, 260, 261.

3. That the alleged agreement between Hall and Bristow, for delay of payment, was not binding on Hall, because, first, the delay was not for any specific time, and second, usurious interest was the consideration of said agreement. Therefore it did not discharge the defendant, Withers. 1 B. Monroe, 285, 324. 3 J. J. Marshall, 527. Barbour's Eq. Dig. 653. 4 Howard's Ala. Rep. 684. 5 Blackf. Rep. 367. 4 ib. 241. 1 ib. 391. 8 Mo. Rep. 49, 316. 13 Ohio, 84, 104.

*Leonard*, for defendant in error.

1. Bristow, one of the defendants, was a competent witness

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for Withers, his co-defendant, notwithstanding he had been a party to the record, there having been a judgment against him by default.

2. Bristow, as the principal debtor, was bound to indemnify the respondent against the costs of the suit, and, so far, had an interest to protect the respondent from a judgment. The release discharged him from that liability, and restored his competency. *Austin v. Dorwin*, 21 Verm. Rep. 38.

3. Bristow's deposition in the first suit was competent evidence for the respondent upon the trial of the second suit.

4. The concealment from the surety of the fact that, instead of the money mentioned in the note being lent to the principal debtor, a portion of it was for usurious interest, to grow due upon the money actually advanced, discharged the surety from his liability. *Pidcock v. Bishop*, 10 E. C. L. Rep. 197. *Stone v. Compton*, 35 ib. 56. *Hagar v. Mounts*, 3 Blackf. Rep. 57. *Whitcher v. Hall*, 11 E. C. L. Rep. 226. *Bonser v. Cox*, 4 Beavan, 379. 4 Penn. State Rep. 353.

5. The respondent put his case to the jury upon the concealment, and not upon the agreement to extend the time; and, therefore, the question as to the effect of such an agreement, founded upon a promise to pay usurious interest, is not now before the court; but if it were, it would be confidently insisted that such an agreement discharges the surety. *Austin v. Dorwin*, 21 Verm. Rep. 44. *Wheat v. Kendall*, 6 N. H. Rep. 504. *Bank v. Woodward*, 5 ib. 106. *Vilas v. Jones*, 10 Paige's Rep. 76.

RYLAND, Judge, delivered the opinion of the court.

This was an action of debt, brought by the plaintiff in error, Washington Samuel, against Jennings Withers, defendant in error, in the Boone Circuit Court, at the March term, 1846, on a note executed by one Julius C. Bristow, as principal, and James M. Clarkson and the defendant, Withers, as securities, for \$1590, payable to John Hall, and by him assigned to Manlius V. Thompson, and by Thompson to the plaintiff.

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From the record, the following may be found as the principal facts in the case.

To the plaintiff's action, the defendant pleaded, 1st, *nil debet*; 2d, payment; 3d, that Julius C. Bristow, the principal in said note, agreed with John Hall, the payee, to pay him usurious interest for the loan of \$1500, without the knowledge or consent of the defendant in error, for and during the space of two months; 4th, that Bristow was principal and the defendant in error security in said note, and that Hall, the payee, knowing the fact, after making said note, and after the same became due, it was agreed between said Hall and Bristow, without the knowledge of the defendant in error, that said Hall should extend the time of payment for the space of two months from the time said note was due and payable; that the said Bristow would pay said Hall two per cent. per month on the amount of said note for two months, for which time payment was delayed and extended without the defendant's knowledge; 5th, usury as to seventy-five dollars of said note; 6th, that, at the time the note became due, the said Bristow was solvent and able to pay the note; that Hall, well knowing the fact, and that Bristow was, at the commencement of this suit and at the time of the assignment to Thompson, wholly unable to pay the same or any part thereof, and that while Bristow was solvent and able to pay the note, and while said Hall owned said note and after it became due and payable, the said Hall corruptly and fraudulently delayed the collection of said note, with intent to charge the said defendant with the payment thereof.

To the 3d, 4th, 5th and 6th pleas the plaintiff in error demurred, which was sustained as to the 4th plea, and overruled as to the 3d, 5th and 6th, upon which the plaintiff joined issue.

On the trial, the plaintiff gave in evidence the note sued on, with the several assignments endorsed thereon, and rested his case. Whereupon, the defendant read in evidence to the jury



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the deposition of Julius C. Bristow, the principal in the note, which was taken in a former suit between the plaintiff in error and the said Julius C. Bristow and James M. Clarkson and the defendant in error, as defendants, and which suit had been determined. The defendant also read to the court, for the purpose of laying a foundation for the introduction of said Bristow's deposition, a release from the defendant in error to said Bristow, and also the record and proceedings in said last named cause, and also read to the court, at the time of offering said Bristow's deposition, a rule of practice of the Circuit Court in relation to the time when objections are required to be filed to the competency and relevancy of depositions filed in a cause. To the reading of said deposition to the jury, the plaintiff objected, but the court overruled the objection and permitted the same to be read to the jury, although the same had not been filed in this cause, nor any notice given the plaintiff that the same would be offered by defendant, and although the deposition of the same witness had been taken and filed in this cause by said defendant, and had not been suppressed; to which the plaintiff excepted.

Before said Bristow's deposition was read to the jury, the plaintiff in error moved the court to exclude from the jury, as evidence, the several parts of said deposition included between the figures 1, 2, 3, 4, 5, 6, 7 and 8, as marked upon the face of the deposition.

Bristow, in his said deposition, states that on the 27th day of March, 1838, he borrowed of John Hall \$1500, and on that day executed his note to Hall, payable two months after date, for \$1590, with Jennings Withers and James M. Clarkson as his securities; the \$90 was added for interest on the \$1500 for two months' time, named on the face of the note; and about the time the note fell due, the witness saw Hall and told him that he would not be able to pay the money at the time the note would fall due, but thought he would be able to pay the money in two or three months. Hall observed that he could do without the money, but he (witness) must pay him

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two per cent. per month interest, which he agreed to pay. Witness further states that he thinks Hall called on him sometime in August, 1838, to receive payment of the note, and witness informed him that he could not pay the money, and still agreed to pay him interest at the rate of two per cent. per month. Withers and Clarkson, witness thinks, knew nothing of any indulgence given by Hall after the note fell due. Witness knows he never informed them of any of their arrangements. Witness states that on the 7th day of July, 1838, he paid Hall \$60, and on the 27th day of August, in the same year, he paid all the interest due at that time, at the rate of two per cent. per month, and on the 6th of September, 1838, he paid \$30; all of these credits are entered on the note. Bristow further stated, that in July, 1839, he, Hall, had a settlement about the interest that had accrued on the note that Hall held on him, and Hall was directed to credit \$80 on the note that Withers and Clarkson were on, which was in his hands, which he credited on another note which he held on witness. This was substantially all the proof given in the cause.

The plaintiff then moved the court to give to the jury eleven instructions as to the law of the case, which are as follows:

1. That if the jury find from the evidence in the cause, that the defendant, Withers, made the note sued on to Hall, and that Hall assigned the same to Manlius V. Thompson, and that the same was assigned by Thompson to the plaintiff, prior to the commencement of this suit, as stated in the petition of the plaintiff, and that the money therein specified had not been paid and was still due and owing at the time of the commencement of this suit, that then the jury ought to find a verdict for plaintiff upon the issue joined between the parties upon the first plea of the defendant filed in the cause.

2. That the jury, in their retirement to consider of their verdict upon the said first plea of the said defendant, will and should wholly disregard and exclude from their minds all that part of the deposition of Julius C. Bristow, read by defendant, in relation to the concealing from the knowledge of the defen-

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dant, as well as the want of knowledge by defendant at the time he executed the said note sued on, as the security of Bristow, that said Bristow had agreed to pay to Hall interest upon the fifteen hundred dollars borrowed by Bristow of Hall, at a greater rate than six per centum per annum, as deposed to in said deposition.

3. That the fact that Julius C. Bristow, the principal obligor in said note sued on, borrowed fifteen hundred dollars of the payee of said note, and the further fact that he, Bristow, agreed to pay to Hall interest at a greater rate thereon than the rate of six per centum per annum, and the further fact that Withers, the defendant, at the time he executed said note to Hall, as the security of Bristow, for the payment of the money borrowed, including the said usurious interest agreed to be paid as aforesaid by Bristow, (as deposed to by Bristow in said deposition) was ignorant and had no knowledge of such usurious interest having been charged by Hall, and agreed to be paid as aforesaid by Bristow, should be wholly disregarded by the jury in their determination or finding of the issue between plaintiff and defendant, made upon the first plea of the defendant.

4. That there is nothing stated in the deposition of Bristow, read in this cause, conducing to show that Withers, the defendant, was not liable or bound to pay to Hall, the payee of the note, at the time of the execution thereof, the sum of fifteen hundred dollars borrowed by Bristow of Hall, and for which said note was given by them, Bristow and defendant.

5. That the ignorance of Withers that the note sued on was given to secure the payment of usurious interest to Hall by Bristow, for the forbearance of the said sum of \$1500, borrowed by Bristow of Hall, does not absolve said Withers from liability to pay all the money so borrowed, and for which said note was given, after deducting therefrom the usurious interest agreed therein to be paid, under said agreement made between said Bristow and Hall, as mentioned in the said deposition of Hall.

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6. The plaintiff moves the court to exclude from the jury the deposition of Julius C. Bristow, read by defendants, and all the evidence therein contained, as being incompetent, irrelevant and inadmissible.

7. That, in this case, the jury are bound by law to find for plaintiff all of the debt in said note specified, with interest thereon at the rate of six per centum per annum down to the present time, after deducting therefrom all usurious interest, agreed to be paid at the date of the note, above the rate of six per centum per annum, after allowing also credits for all payments made upon the note after its execution, if they find that the defendants made the same, and that the same was assigned to plaintiff, as stated and set forth in said petition of plaintiff.

8. That, in this case, the defendant has given to the jury no evidence conducing to show that the plaintiff is not entitled to recover in this action.

9. That, if the jury find from the evidence, that the defendant, Withers, executed the note in the petition mentioned, as the security of Julius C. Bristow, and that the said note was assigned to the plaintiff as stated in the petition, and that only fifteen hundred dollars was loaned by John Hall to said Bristow, and if the jury further find that there was usurious interest included in said note, then the jury must find for the plaintiff the sum of fifteen hundred dollars, with interest at six per cent. per annum from the time the said note fell due, after first deducting therefrom the credits upon said note and the amount proven by said Bristow in his evidence to be paid; unless the jury shall further find, that said John Hall obtained said note from the said Withers by fraud, covin and misrepresentation in concealing and fraudulently and corruptly intending to deceive and defraud the said defendant, Withers. This instruction goes to the third plea of defendant.

10. That, if the jury find from the evidence, that Bristow executed the note in the petition mentioned, and that defendant, Withers, executed said note as security, and that the said note has been assigned to the plaintiff, as stated in the petition, and

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that the amount of fifteen hundred dollars was the amount of money borrowed of the said John Hall, and if the jury further find that the said note was drawn and executed as first stated in this instruction for fifteen hundred and ninety dollars, then the jury must find for the plaintiff on the issue in the fifth plea, the sum of fifteen hundred dollars, with interest thereon from the time said note fell due, after deducting the payments endorsed upon said note, and the payment proven by Julius C. Bristow, in his deposition, unless the jury shall further find that said note was procured from the defendant, Withers, by the said Bristow, with the knowledge and consent of John Hall, with intent to conceal, defraud and deceive the said defendant, Withers.

11. That, if the jury find from the evidence, that the defendant executed the note in the petition mentioned, and that said note has been assigned to the plaintiff, as stated in his petition, and if the jury further find that the defendant was the security in said note of Julius C. Bristow, as stated by defendant in his sixth plea, then the jury must find the issue under that plea in favor of the plaintiff, unless the jury further find that John Hall, the payee in said note, corruptly and fraudulently delayed the collection of said money due in and by the said note from the said Bristow, with intent to charge the said Withers, the defendant, with the payment of said note.

To the giving of which, the defendant objected, and the court refused to give all of said instructions, except the eleventh, which was given.

Whereupon, the defendant moved the court to give to the jury two instructions, as follows :

1. If the jury believe that the defendant was the security in the note sued on, and that Bristow was the principal debtor, and that it was agreed between Hall, the payee, and Bristow, the principal debtor, that Hall should loan Bristow fifteen hundred dollars for two months, and that the latter should pay ninety dollars for the use of this sum for those two months, and that this was more than lawful interest, and that a note

should be drawn payable to Hall for the said fifteen hundred and ninety dollars, at two months, and be executed by him and his securities; and further find the fact that ninety dollars of the amount of the note was for interest as aforesaid, and that the same was concealed from Withers at the time he executed the note, they will find for the defendant upon the third plea.

2. If Withers was mere security in the note sued on, then the concealment from him of any of the material terms of the contract, releases him from his obligation upon the note.

Which were given, and to the opinion of the court in giving defendant's instructions, and in refusing the plaintiff's instructions, the plaintiff excepted; whereupon, the jury found their verdict for the defendant, and judgment was rendered by the court accordingly. The plaintiff then filed his motion and reasons for a new trial, which was overruled by the court, and this cause is brought to this court by writ of error.

The plaintiff in error relies, for a reversal of the judgment below, upon the acts and decisions of that court, in permitting the defendant to read, under the circumstances set forth in the above statement, the deposition of Julius C. Bristow; also, upon the refusal to give the instructions prayed for by him, and upon the giving of the two instructions for the defendant.

These points, therefore, will receive the consideration of this court, or such of them as may be deemed material.

1. First, then, as regards the decision of the court in permitting the deposition of Bristow to be read. The judgment by default against him, in a former suit upon the same note, and the release from Withers to Bristow of all liability to pay the costs which may be adjudged in this action against Withers, may be considered as restoring the competency of Bristow. He may, therefore, be regarded as a person competent to testify. See *Hogg, administrator of Garrett, v. Breckinridge & Ferguson*, 12 Mo. Rep. 369, where this point was decided by this court.

But the competency of Bristow, as a witness, does not, of itself, authorize the reading of his deposition. It appears



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that the deposition of this man had been taken in a former suit, in which the plaintiff in this present action was plaintiff, and Withers, Bristow and Clarkson, defendants; and which action had been determined some years before this trial; that the deposition had remained on file among the records of that case in Boone Circuit Court; and it also appears that the deposition of the same man was taken on the part of Withers in this present action, and was then on file among the records of this case, unsuppressed. There were two depositions of this man. The defendant offered to read the one taken in the former suit, without ever having filed it among the papers of this suit, or even having given notice to the plaintiff that he should offer it in evidence. This court has heretofore decided that a deposition taken in a former suit between the same parties, is competent evidence in a subsequent action between them, if properly taken; but though it be competent, yet it is the opinion of this court that notice of its intended use should be given, or it should be filed anew in the suit, so that the party against whom it was intended to be read may have knowledge thereof. The decision of the court below, in permitting the defendant to read Bristow's former deposition, under the circumstances of this case, as appears from the record, was erroneous.

2. From the instructions given to the jury, it appears that the case was submitted to them upon the issue of a concealment from Withers, by Hall and Bristow, of material terms of the contract of loan at the making of the note. In the opinion of this court, the court below erred in giving the instructions for the defendant which are set out above. The omission to disclose the fact that the principal debtor had agreed to pay usurious interest to the creditor; or to disclose the fact that usurious interest was calculated upon the amount borrowed, and is included within and forms a part of the amount on the face of the note, never can operate in law as a discharge of the security to the note. To declare the law to be thus, in this country, where promissory notes and bonds are assignable by

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law, and pass so currently and so freely from man to man, would be productive of serious consequences to the public. The authorities cited by the counsel for the defendant in error, do not go to this length. As far as we have been enabled to examine and investigate the subject, the mere concealment of the real sum borrowed, and the usurious interest, have never yet been declared to exonerate the securities on a note given, where, by law, usury itself did not render the note void. With us, usury does not destroy the obligation of a note; it affects only the interest. The case of *Pidcock v. Bishop*, cited by the defendant's counsel, 10 Eng. Com. Law Rep. 197, does not alone depend upon the concealment of material matters, at the time of making the note or contract, for the exoneration of the security, but, upon the principle that the concealment from the surety of any of the material terms of the contract, which increases the risk he is under, or which varies or enlarges his responsibility, is a fraud upon him. The agreement in *Pidcock* and *Bishop's* case was considered a direct fraud upon the surety. The case of *Stone v. Compton*, 35 Eng. Com. Law Rep. 57, was also one of fraud on the security, and it was the misrepresentation of a material fact by the plaintiff's agent, when he read the mortgage deed, and stated untruly that £800 had been paid, when it had not, and was afterwards deducted from the amount mentioned in the promissory note which was signed by the security. This was held to be a fraud in law which released the security. The case of *Hagar et al. v. Mounts*, 3 Blackf. 57, was also a case in which fraud was the ingredient which was declared to exonerate the security. The case of *Whitcher v. Hall*, 11 Eng. Com. Law Rep. 224, was decided upon another principle. A majority of the judges held that the contract there was an entire contract for the letting of thirty cows, neither more nor less; that the plaintiff was, in this action against a surety, bound to prove a literal performance of the contract, and not having done so, was properly non-suited; that any variation in the contract made without the security's consent thereto, would discharge the security. In the case of

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*Bouser v. Cox*, 4 Beavan, 379, A. gave to C. a promissory note as surety to B. on an agreement that C. should advance the amount to B. by *draft at three months date*. C. made the advance *immediately* to B. and not by draft at three months; *held*, that the surety was released. The money had not been advanced on his contract, nor could an action be maintained for the money for that very reason. He was to pay on a certain condition: it had never been complied with: he never was liable. None of the numerous cases on the subject of principal and surety, go so far as the defendant's doctrine in this case. There certainly was no fraud in the failure to disclose the fact that usury had been exacted of the borrower by the lender, and the amount put in the note. I doubt if ever a security asked, or was even informed when called upon to sign a note, as a friend for another, that the note was in part for usurious interest on a loan. Usury does not make the note void—does not destroy the obligation to pay the real sum borrowed.

Upon the view, then, taken by this court upon this subject, it will not be necessary to notice the instructions prayed for by the plaintiff below. The judgment must be reversed for those given for the defendant, and for the admission of the deposition of Bristow.

Judge Gamble concurring, the judgment below is reversed and the cause remanded.

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GROVES' HEIRS, Appellants, *vs.* FULSOME, *et al.*, Respondents.

1. A. entered a tract of land and, finding the wife of B. in possession without any claim of pre-emption, paid her for yielding up possession to him. Subsequently, she obtained a patent for the land from the government, under color of a right of pre-emption. *Held*, she holds the title thus acquired, as a trustee for the benefit of A.
2. A married woman, whose husband is alive and has sold the improvements to another, under whom she is in possession, has no right of pre-emption, under the act of congress of May 29th, 1830, or any of the acts supplementary thereto.

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3. Although the state courts cannot interfere with the primary disposition of the soil by the general government, yet, if one obtains from the United States the legal title to a tract of land, and in so doing, is guilty of a fraud towards another, or affects himself with a trust, he shall hold the title thus acquired, for the benefit of those who have been injured by his conduct.
4. Frauds and trusts are not within the statute of frauds.
5. If a bill in chancery contains no equity, it should be demurred to; if it is allowed to stand, evidence should be admitted to sustain it.

*Appeal from Crawford Circuit Court.*

The facts are sufficiently stated in the opinion of the court. *Johnson*, for appellants.

The evidence offered by the complainant and excluded by the Circuit Court, proved every allegation in the bill and more, and came from competent witnesses. It was, therefore, relevant and competent.

If the bill did not present an equitable case, the defendants should have demurred. This they did not do, but answered, virtually admitting the equity and relying on *facts* to repel it.

Groves had a right to enter the land. Fulsome, the husband, had no right of preëmption at the time. He had previously abandoned the possession, and pledged his improvements to Benton, and Benton had sold them at public sale. Improvements constitute the only foundation for a preëmption or preference in the purchase of public land. A party abandons his claim to a preëmption by selling his improvements. *Bird v. Ward & Cravens*, 1 Mo. Rep. 398. If the husband had abandoned his right of preëmption by selling his improvements in 1835, there could not remain a right of preëmption in his wife, in February, 1835, he living at the time. It is not pretended that Mrs. Fulsome sold her right of preëmption to Groves. She had none to sell, even if she could have sold it. She merely sold and he bought her improvements. He could have ejected her at any time after he purchased the land. He did not choose to avail himself of his legal rights, but extended a gratuity to her, and paid her own price for the labor she had expended in making the improvements. She then turned

around, and without notice to Groves, entered the land, in part with the very money received on the sale of her improvements and received a patent from the government. This conduct was a fraud. Fraud is defined to be any unfair way by which another is cheated or overreached. 3 Atk. Rep. 757. Tucker's Com. 2 vol. 418.

In *Huntsucker v. Clark*, 12 Mo. 337, it was held, that "if a preëmption right, under the laws of the United States, is secured by the fraudulent practices either of the party himself or the officers of the general government, a court of equity will afford redress to the person injured." "Such interference does not proceed upon any assumption of a right on the part of the courts to revise the determination of the federal officers, but is based upon an undisputed jurisdiction incident to all courts of equity over the subject of trusts and frauds. Federal officers have no judicial power and such questions must be left to our judicial tribunals, and their determination does not involve any interference with the primary disposal of the soil." The difficulty suggested in the case of *Lewis v. Lewis*, 9 Mo. 183, of a premature interference by the courts, does not exist in this case, because a patent has issued, as admitted by defendants in their answer.

The case of *Stephenson v. Smith*, 7 Mo. Rep. 610, shows that a court of equity will require a party who procures a patent from the general government by fraud, to convey to him who is equitably entitled.

Sales of improvements on public lands are not within the statute of frauds. *Clark v. Shultz*, 4 Mo. 235. *Huntsucker v. Clark*, 12 Mo. 337.

*Frissell*, for respondents.

The Circuit Court did not err in excluding the evidence offered by the plaintiff, tending to show a sale of her preëmption right by Mrs. Fulsome, because, 1. A preëmption right to United States land, since the act of congress of May 29th, 1830, is a personal privilege, and the act makes all sales void, prior to the issuing of final receipts or certificates. Act of

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May 29th, 1830, sec. 3, last clause. Act January 23, 1832. *Huntsucker v. Clark*, 12 Mo. 336. 2. The evidence was parol. A preëmption is such an interest in lands that a parol contract in reference to it is void under the statute of frauds.

Groves ought not to complain of Mrs. Fulsome for taking his money and then claiming her right of preëmption, for he had in the first place acted fraudulently and oppressively towards her, by entering her out of house and home, when he was compelled to swear, before he could make the entry, that there were no improvements on the land except his own. *Laws, Opinions, Instructions, &c. Part 2d, 545.*

Admitting that Mrs. Fulsome had practised a fraud upon Groves, of which he could complain in a court of equity, yet Jesse Fulsome was really an innocent purchaser.

SCOTT, Judge, delivered the opinion of the court.

This was a suit in chancery, begun by Ezekiel Groves, (who, dying, was replaced by his heirs,) against Jesse Fulsome, John Propste and others. The bill states that in May, 1836, E. Groves entered the tract of land which is the subject of this controversy, containing eighty acres, at the land office in the Jackson district. In February, 1837, Groves agreed to convey the land to E. Wilson, and bound himself in a penalty to make a title on or before the 1st March, 1840. At the date of this agreement, Susannah Fulsome lived on the land, which had some improvements upon it. Groves and Wilson, wishing to avoid difficulties, and being unwilling to take the land without paying for the improvements, proposed to Mrs. Fulsome to give her fifty dollars for her improvements, or the sum at which they should be valued by two disinterested men. She preferred the first branch of the proposition, received the sum offered, and voluntarily yielded possession to Wilson. During the latter part of the year 1837, Mrs. Fulsome made application to prove a right of preëmption to the land, and Groves was notified to attend, which he accordingly did, but the matter was postponed indefinitely, and afterwards, in February, 1838, without any notice to him, Mrs. Fulsome was permitted



to enter the land, under the claim of a right of preëmption, and obtained a patent for the same. Upon this, in 1843, the administrator of Wilson, who had in the mean time died, began a suit against Groves, on his bond for a title, and recovered the purchase money with interest. In February, 1838, Mrs. Fulsome conveyed the land to John Propste, her brother, and in 1847, Propste conveyed it to Jesse Fulsome, a son of Mrs. Fulsome. In 1848, Mrs. Fulsome died, leaving three children, Jesse, Malinda and Jane. The bill states that Propste was fully apprised of the conduct of his sister, and guided her by his counsel, and assisted her with his means; and that, at the time of the conveyance to Jesse Fulsome, he had full knowledge of all the circumstances under which his mother's title was obtained. Fulsome and Propste relied on the statute of frauds, and in their answers, deny all notice, and insist that they were purchasers for a valuable consideration.

On the trial, the evidence of several witnesses was offered in support of the allegations of the bill; also, that E. Fulsome, the husband of Mrs. Fulsome, went to the south in 1835, with horses, and has never returned. Before his departure, he pledged the tract of land in dispute to James Benton, who afterwards sold it at public sale about the time it was entered by Groves, with an understanding that, if he had entered it, the contract should be rescinded; that Mrs. Fulsome was apprised of the sale, and was asked if she had any right of preëmption to the land. She answered that she had not, that her husband had sold his improvements to Benton, and that she was permitted to live on the place, by his kindness and indulgence. Evidence was also offered tending to show in Propste a knowledge of the circumstances of this transaction, all of which was excluded, to which an exception was taken. There was a decree dismissing the bill, and the complainants appealed to this court.

1. It does not appear from any thing in the cause, under what law of congress Mrs. Fulsome claimed the right of preëmption, which she was permitted to prove up in the month of

February, 1838. The assertion in one of the answers, that she was entitled under an act passed in 1820, is evidently a gross error. It must have been under the act of 29th May, 1830, or some of the acts supplementary thereto. If under any of these enactments, her right had no foundation in law, and an act of great injustice was done to Groves, who had previously entered the land, by Mrs. Fulsome, in entering the same under the claim of a right of preëmption. The provision of the law of congress, prohibiting a sale of the right of preëmption, had no application to this case.

2. Mrs. Fulsome had no right of preëmption. She was not the head of a family, as her husband was alive, and had, for a valuable consideration, sold the improvements to another, under whom she claimed, as she admitted. From the evidence in the case, it is clear that the entry of Groves was lawful, as no right of preëmption existed at the time it was made. But if the law was violated, Groves had no hand in it. The improvements were purchased by Benton from Fulsome, and Groves does not claim under Benton. Groves, then, finding Mrs. Fulsome in possession, without any claim to a right of preëmption, gave her fifty dollars to yield to his vendee that possession. With the money thus obtained, she entered the land, the possession of which she had voluntarily given up, under the color of a preëmption, to which she declared she had no right. We cannot but regard this conduct on her part as a fraud on Groves, and the right she acquired by such means must be clothed with a trust for the benefit of Groves.

3. While we are aware that we cannot interfere with the primary disposition of the soil by the general government, yet our courts must not permit citizens of this state, owing obedience and subjection to her laws, under the protection of this principle, to trample under foot the laws securing the observance of good faith in the transactions between man and man. Hence our courts have held, that, although one may obtain from the United States the legal title to a tract of land, yet, if in so doing he is guilty of a fraud towards another, or affects

himself with a trust, he shall hold the title thus acquired for the benefit of those who have been injured by his conduct. *Smith v. Stephenson*, 7 Mo. Rep. In yielding her possession to Groves' vendee, for a valuable consideration, Mrs. Fulsome impliedly undertook not to interfere with his rights. It is a fraud for a settler on the public lands to sell his improvements, and with the money go and enter from his vendee the very land which he had been paid to yield up. It is not acting in good faith towards him from whom the purchase money was received. It is true, the purchaser ought to have known that the land might have been taken from him at any time, but he could not expect such conduct from him to whom he had paid a valuable consideration for the right of occupancy. It is better that the sale of a tract of land should be delayed a little while, than that such frauds should be tolerated. The present case is stronger than any of those supposed. Groves had entered his land, and to avoid difficulties and the imputation of acting harshly in depriving another of her improvement, without compensation, he paid for it. The occupant, afterwards, with this very money, enters the same land under color of a preëmption, to which she had no claim in law. Under such circumstances, she must be regarded as a trustee for the benefit of Groves.

4. It is obvious that the statute of frauds has no application in this cause. That statute has never been perverted to the protection of fraud. It is well settled that frauds and trusts are not within the provisions of the statute.

Groves can only have a decree, on the payment of the purchase money advanced by Mrs. Fulsome, as it is presumed that he has or may withdraw from the land office the money he paid when he entered the land.

5. The court rejected all the evidence offered by the complainants. Such a course is rather unusual. The evidence certainly tended to prove the case made out in the bill, and so long as the bill was regarded as containing equity, the evidence offered in support of its allegations should have been received.

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State v. Smith.

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From the course of the proceeding, it would appear that a demurrer should have been filed to the bill. To let the bill stand, and yet to refuse any evidence to maintain it, seems rather an incongruity. The complainant, after the rejection of all his evidence, was under no obligation to go farther and offer proof of the fraud in Jesse Fulsome.

The other Judges concurring, the decree will be reversed and the cause remanded.

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THE STATE OF MISSOURI, Plaintiff in Error, *vs.* SMITH,  
Defendant in Error.

1. Under the 24th section of article 3 of the act concerning "Crimes and Punishments," (R. S. 1845) a person may be indicted in the same count for burglary and either grand or petit larceny.

*Error to Chariton Circuit Court.*

*Gardenhire*, attorney general, for the State, contended, 1. That a motion does not lie to quash an indictment for a felony. 1 Chitty's Crim. Law, side paging, 299. *State v. Rector*, 11 Mo. Rep. 28. 1 Ch. Pl. 300. 2. That the indictment was sufficient. Sec. 24 of art. 3 of act concerning crimes and punishments, R. S. 1845.

SCOTT, Judge, delivered the opinion of the court.

Smith was indicted for burglary in entering a dwelling house and stealing therefrom goods of the value of two dollars. On his motion, for the following reasons, or some of them, the indictment was quashed, viz :

1. Because said indictment, in the same count, charges the defendant with a felony and a misdemeanor.
2. Because said indictment, in the same count, charges the defendant with two distinct offences, for which the judgment and punishment would, on conviction, be different.
3. Because said indictment charges defendant with a mis-

demeanor, for which a prosecutor is required by law to endorse his name on the indictment, or which must be presented on the information of two of the jury, and no such name is endorsed, nor is such presentment made.

4. Because there is no offence sufficiently charged in said indictment.

5. Because said indictment is in other respects informal and insufficient.

We do not conceive how this matter can be rendered plainer than it is by the 24th section of the third article of the act concerning crimes and punishments. That section enacts that "if any person, on committing burglary, shall also commit a larceny, he may be prosecuted for both offences in the same count, or in separate counts in the same indictment, and on conviction of such burglary and larceny, shall be punished by imprisonment in the penitentiary, in addition to the punishment heretofore prescribed for the burglary, not exceeding five years." Now, surely, the word "larceny" will comprehend *petit* as well as grand larceny. Of this there can be no doubt. The other Judges concurring, the judgment will be reversed and the cause remanded.

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THE STATE OF MISSOURI, Respondent, *vs.* COOPER, Appellant.

1. A person was indicted for a violation of the first section of the act of 1845, concerning "Groceries and Dram Shops," in selling liquor without license. The indictment charged that he had sold one pint. The proof was that he had sold a half pint. *Held*, the proof was sufficient to sustain the indictment.

*Appeal from Newton Circuit Court.*

*Gardenhire*, attorney general, for State.

If the evidence corresponds with the allegations, in respect to those facts and circumstances which, in point of law, are essential to the charge, it is sufficient. 1 Chitty's Crim. Law, 293. The allegation is the selling one pint of whisky. The

circumstance essential to the charge is, the selling of any quantity. The first section of the act concerning "Groceries and Dram Shops" prohibits the sale of any quantity of intoxicating liquors without license. If there is no license, the quantity sold is immaterial.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted for selling spirituous liquor in less quantity than one quart, to-wit: one pint, without license. He was tried and convicted. On the trial, the proof was that he sold a half pint of spirituous liquor to one Mansfield, for the price of ten cents, within the time laid in the indictment.

The defendant moved the court to instruct the jury "that unless the quantity sold was one pint, they ought to find the defendant not guilty." The court refused this instruction, the defendant excepted, and brings the case here by appeal.

There was no error in refusing to give the instruction prayed for. The offence consists in selling, without license, spirituous liquor in less quantity than a quart. A half pint makes the offence. The State was not bound to prove the exact quantity, so that the quantity proved to have been sold was such as the law forbade. Here the offence was completed by the sale of a half pint, equally as much as if the proof had shown the quantity to be a pint.

There is no error in the judgment of the court below; it is, therefore, with the concurrence of the other Judges, affirmed.

END OF JULY TERM.



CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT  
OF THE  
STATE OF MISSOURI,  
OCTOBER TERM, 1852, AT ST. LOUIS.

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KISSELL, Plaintiff in Error, *vs.* THE BOARD OF PRESIDENT  
AND DIRECTORS OF THE ST. LOUIS PUBLIC SCHOOLS, De-  
fendants in Error.*

1. The survey, designation and setting apart, for the support of schools, of a piece of property, described to be within the out boundary of the town, as directed to be surveyed under the act of June 13, 1812, taken together with the act of 1831, make a regular, formal title to the property so set apart.
2. An entry of the same land with the register and receiver must yield, in an action of ejectment, to the title under such designation.
3. If the purchaser, under such an entry, is allowed to question the legality of the act of setting the property apart for the support of schools, he must show it to be entirely without authority of law, and void, in order to have benefit from such impeachment of title.
4. A designation, which describes the land set apart for schools, as "within the bounds of the survey directed to be made by the first section of the act of June 13, 1812," &c., and as "within the limits of the town of St. Louis, as it stood incorporated on the 13th June, 1812;" &c., is not invalid on its face, although it does not state that the land thus set apart ever was, in whole or in part, a town lot, out-lot or common field lot, belonging to the town, or that it was set apart as such.
5. The fact that the survey of the out boundary of St. Louis, under the act of 1812, professes to be a survey of the *incorporated* town, with the out-lots, common field lots

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**Eberle v. Schools and Lane's Executors v. Schools.* RYLAND, Judge. These cases, coming within the principles decided in the case of *Kissell v. Schools*, must be governed by the decision in that case. Judgment affirmed.

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Kissell v. St. Louis Public Schools.

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and commons, does not invalidate it, when it is manifest that the incorporated town, according to its own limits, must be within the out-boundary required to be run.

6. The fact that the survey of the out-boundary includes too much or too little land, does not invalidate it, as to any property rightly included within it; and to impeach the survey, it must be shown that the land in dispute was not rightly included.
7. The first section of the act of 1812 contemplates a continuous out-boundary of the towns, to be so run as certainly to include the out-lots, common field lots and commons of the towns.
8. It was not necessary, in order that property included within the out boundary should be reserved for the support of schools, that it should have been surveyed into town lots, out-lots or common field lots under the Spanish government.
9. The act of 1812 was designed to dispose of all the property included within the out-boundaries of the towns.
10. Vacant land contiguous to the town of St. Louis, bounded on all sides except one fronting on the river, by land surveyed into lots, might properly have been set apart as an out-lot, according to the practice of the government, though it had never itself been surveyed as a lot.

*Error to St. Louis Circuit Court.*

This was an ejectment for a lot south of Mill Creek, in Evans and Langham's addition to the city of St. Louis. On the trial, the plaintiffs below, defendants in error, offered the following documents in evidence :

1. An order of the St. Louis Court of Common Pleas incorporating the town of St. Louis, dated November 9, 1809, a copy of which may be found in the report of the case of *Eberle v. Public Schools*, 11 Mo. Rep. 248.

2. A map marked X, purporting to be a plat and description of the survey of the out-boundary line of the town of St. Louis, in the territory of Missouri, as it stood incorporated on the 13th June, 1812, including the out-lots, common field lots of the common fields of St. Louis, and the commons thereto belonging, made in pursuance of the first section of the act of congress, approved June 13th, 1812, entitled "an act making further provision for settling the claims to land in the territory of Missouri."

3. A survey by the surveyor general, in pursuance of instructions from the commissioner of the general land office, setting apart, for the use of schools in the city of St. Louis, certain land, including the premises in question.

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The possession of the defendant was admitted.

At the close of the plaintiffs' case, the defendant asked the following instruction :

"The map marked X and the location and survey do not prove or tend to prove that the premises in question are any part of a field lot, out-lot, or town or village lot, within the meaning of the act of June 13th, 1812, and reserved for the use of schools, within the meaning of the said act and the several acts of congress in relation to said reservations."

This instruction was refused and the defendant duly excepted.

The defendant then introduced the following evidence :

1. Survey of fractional section twenty-six, township forty-five north, range seven, east of fifth principal meridian, dated March 25, 1836 ; also, a plat of said survey.

2. Certified copy of entry by Robert Duncan, on preëmption allowed of said fractional section, from the office of the register and receiver at St. Louis, dated May 2, 1836.

3. Receipt of the register and receiver for the purchase money.

4. Records and deeds deducing title from Robert Duncan to defendant.

5. An old map, known as Chouteau's map, found in the office of the recorder of land titles, purporting to be made in 1780, and to represent the Spanish town of St. Louis, as fortified by Lieutenant Governor Cruzat. . This map was verified by witnesses and represented the south line of fortifications as north of Mill Creek.

6. An ordinance of the trustees of the town of St. Louis, made in 1811, establishing the boundaries of the town, by which Mill Creek is fixed as the southern boundary.

7. Assessment roll of the town for the year 1812, in connection with the testimony of William C. Carr, who was then assessor, showing that the municipal jurisdiction was confined to the boundaries stated in the above ordinance.

8. The following surveys, plats and maps : Maps of Ste. Genevieve and New Bourbon ; plat of Village-à-Robert ; sur-

vey of Portage des Sioux ; Spanish survey of Chouteau Mill tract ; surveys 316, 317 and 318, vacant land at south end of town of St. Louis, and 314 and 315 ; township map of township 45, range 7 east ; plats of common fields of St. Louis, Grande Prairie and Prairie des Noyers common fields, and field notes of the survey of these common fields.

William H. Cozzens, Robert Simpson, René Paul, Pascal L. Cerré and David Adams, witnesses for defendant, gave evidence showing that the actual southern boundary of the inhabited part of the town, in 1812, and for many years afterwards, was north of Mill Creek, and that, at that time, there were no town or village lots south of the creek. Paul testified that he surveyed the town in 1816 and again in 1823 ; that in 1816, there were no buildings on fractional section 26, but in 1823, there was a brick house next north of Soulard's line. He did not know whether there was any occupation between Soulard's line and the creek, in 1816. Cerré testified that there was some unoccupied land between Soulard's farm and the creek, in 1812, or about that time. Moore stated that, in 1814, there were no buildings or timber south of the creek, until you came to Soulard's farm ; that there was an open space between the farm and creek. Adams stated that there was vacant land between the creek and Soulard's lines, and that there were no inclosures there in 1812. Papin, Ortey, and Vasquez stated substantially the same. It was also shown that the lot in question was not covered by the common fields.

William Milburn testified that he was surveyor general in 1839-40-41, and clerk in the office as far back as 1816, and that he constructed map X, given in evidence by plaintiffs, from previous surveys made under the authority of his predecessors in office ; that Brown made different surveys, under the authority of government, of Prairie des Noyers, Grande Prairie fields, common fields and commons, between 1817 and 1820, all of which were made by retracing lines made under the Spanish government ; that the lines on the map were taken from these surveys, except the line of the commons, taken from

survey of commons in 1832 or '33 ; that the line of the corporation, as marked on map X, was first run in 1820, and the north line thereof was resurveyed, in making the map. Witness stated that there never was any survey of out-lots, *eo nomine* ; but there were surveys of commons, common field lots and village. On cross examination, he stated that map X correctly delineated the out-boundary of the town of St. Louis, including the commons, common fields and out-lots, except that it might have included the Grande Prairie common fields, Prairie des Noyers, some common fields south-west of Grande Prairie, and Cul de Sac common fields. If these had been included, it would not alter the effect of the survey on the parties to this suit.

Plaintiffs, in reply, offered evidence tending to show that the land set apart and claimed was of the description reserved for schools by the act of June 13, 1812.. To this defendant objected, for the reason that, if the plaintiffs claimed the land as an out-lot, they should have given the evidence before they rested and not in reply—that it was a new and distinct claim. The objection was overruled and defendant excepted. Plaintiffs then gave in evidence various concessions of lots along the river, north and south of the village of St. Louis, and confirmations of the same, showing that some of them were confirmed by the name of out-lots ; also, map of the subdivision of Shawneetown into in-lots and out-lots, under the act of 1811 ; and maps showing out-lots of St. Louis, St. Charles, Carondelet, St. Ferdinand, New Madrid, Portage des Sioux, and Mine-à-Breton. The letters of instruction to the surveyor general were also offered ; also, a letter from the commissioner of the general land office, directing the entry of Robert Duncan to be cancelled.

Antoine Smith, a witness for defendant, in rejoinder, testified that he never knew the village authorities to exercise any control over the lots south of the village.

The defendant asked the following instructions, all of which were refused :

1. The jury are instructed that the claims of the respective parties to the land in controversy must depend, mainly, upon the question, whether it was reserved for the schools by the act of congress of 13th June, 1812. If not reserved for the schools, it was land liable, or which might be the subject of preëmption, and the decision of the register and receiver of the land office at the period when this claim was allowed, is final and conclusive.

2. If not reserved for the use of schools, the certificate, showing payment, and the survey and the subsequent conveyances under which defendant claims, are sufficient evidences of title to protect the possession of the defendant, and to enable him to call in question the validity of the proceedings under which the plaintiffs claim.

3. The defendant claiming under a sale by virtue of a judgment in favor of the United States, these proceedings are an admission of title in Langham, under whom defendant claims, of such a right as will enable the defendant to call in question the validity and regularity of the proceedings under which the plaintiffs claim. This and the two preceding instructions require that the jury shall believe the certificates of the register and receiver, and the receipt, the judgment, execution and deeds to Langham, Evans and defendant, were duly executed.

4. In ascertaining whether the land was reserved for the use of schools, the jury will find, from the evidence, first, whether the land in controversy was a village or town lot within the limits of the old Spanish town of St. Louis, as it existed prior to or at the time of the transfer of the country from its former owners to the United States, or any part of such lot; second, if the jury believe it was not such village or town lot, or any part of such village or town lot, they will then find from the evidence, whether it was a common field lot or out-lot belong to the said town or village of St. Louis.

5. In ascertaining whether the land in controversy was a common field lot or out-lot belonging to the old Spanish town of St. Louis, the jury will find, first, whether the land in



controversy was a lot, that is, whether it had been designated as such before the change of government ; second, whether the land in controversy was subject to the regulations of the village authorities as were the common field lots, commons and village lots belonging to said town or village.

6. If the jury shall find that the premises in question were no part of a town or village lot, out-lot, or common field lot, within the rules before laid down, they will find for the defendant.

7. In ascertaining the facts in the case, if the jury shall find that the survey designated map "X," and the setting apart by the surveyor general of the land marked B, have been made upon the assumption that the town, as claimed to be incorporated by the Court of Common Pleas, was the town or village referred to in the act of 13th June, 1812, they will reject such surveys as founded upon erroneous data, and not made according to law : provided, also, they believe the old or Spanish town was altogether different in its exterior lines and boundaries from the said claimed incorporation.

8. If the survey and setting apart the land in controversy shall be found to be of land as within the town or village of St. Louis, and the jury shall find the same is without the town or village, then the survey and setting apart are to be rejected as any evidence of right in the plaintiffs.

9. The jury are instructed that the fact that various distinct parcels of land around St. Louis, have, since the passage of the act of 1812, been called out-lots in the reports of the recorder and in the surveys, is no evidence that the premises in question, or any part thereof, was an out-lot, unless it shall also appear that the premises in question was part of a series of allotments, known and designated as out-lots, belonging to said village before the change of government.

10. The act of congress of 13th June, 1812, did not require a continuous boundary, which should include the town, common fields, out-lots and commons, where either was sepa-

rated from the other by intervening tracts ; in such cases, the act required separate surveys of each.

11. If a continuous boundary is required by the act of 13th June, 1812, then the line should be so run as to make the eastern line of the commons the eastern boundary, so far as that line extends from south to north, and then connect the north-eastern corner of the commons with the old town by a straight line.

12. If the jury find from the evidence, that the land sued for in this action was not a town lot, village lot, or common field lot, at the time the American government took possession of Upper Louisiana, they will find for the defendant.

13. If the jury find from the evidence, that the land embraced in this suit was beyond the limits of the town of St. Louis, as said town existed under the French and Spanish governments, and that on the 13th June, 1812, it was not any part of the land inhabited, used or laid out for the purposes of said town or its inhabitants, they will find for the defendant.

14. If the jury believe from the evidence, that the land in question was, during the French and Spanish governments, outside of the town of St. Louis, and was, as late as 13th June, 1812, an unappropriated and vacant space beyond the regular limits of said town, they will find for the defendant.

15. That the act of congress of 13th June, 1812, entitled "an act making further provisions for settling the claims to land in the territory of Missouri," does not reserve, for the use of schools in towns and villages therein mentioned, any land which had not been made a town or village lot, out-lot or common field lot previously and by proper authority.

16. If the jury find from the evidence, that the survey of the out-boundary line of the town of St. Louis, under the act of 13th June, 1812, could have been run so as to include the out-lots, common field lots and commons thereto belonging, and exclude the land in this action sued for, they will find for the defendant.

17. If the jury find from the evidence, that the land in question, before and on the 13th June, 1812, was a vacant space, not embraced within the streets of St. Louis, nor included among the regular lots of the village, and that it had never been a common field lot, then the said act of congress did not reserve it for the support of schools.

18. That the town or village lots, out-lots and common field lots reserved for the use of schools by the act of 13th June, 1812, and relinquished by the act of 29th January, 1831, to the inhabitants of the several villages therein mentioned, was a reservation to the villages, as they were under the French and Spanish governments, and the act of the legislature incorporating the plaintiffs, to be elected by the inhabitants of the city of St. Louis, as it stood incorporated at the passage of said act, is ineffectual to divest the trust fund from the ancient inhabitants of the village of St. Louis to the modern city of St. Louis, and the authority in the act, authorizing the election of the board of directors by other than the grantees, is null and void, and the plaintiffs cannot maintain this action.

19. The preëmption to Robert Duncan conferred a valid claim under the preëmption laws, and he, having settled on the land before any survey thereof was actually made, is entitled to hold it; and the persons deriving title from said Duncan have a title superior to the plaintiffs.

20. The court is requested to instruct the jury, that the paper offered in evidence by the plaintiffs, marked No. 2, and headed General Land Office, August 1st, 1845, and signed James Shields, commissioner, and addressed to "Register and Receiver, St. Louis, Missouri," does not invalidate or affect the entry of the land in question by Robert Duncan, under the preëmption laws of the United States, and that the same is no evidence in this cause, and is excluded from the consideration of the jury.

21. The survey attempted to be given in evidence by the map marked "X," is not of itself any evidence that the land

rated from the other by intervening tracts ; in such cases, the act required separate surveys of each.

11. If a continuous boundary is required by the act of 13th June, 1812, then the line should be so run as to make the eastern line of the commons the eastern boundary, so far as that line extends from south to north, and then connect the north-eastern corner of the commons with the old town by a straight line.

12. If the jury find from the evidence, that the land sued for in this action was not a town lot, village lot, or common field lot, at the time the American government took possession of Upper Louisiana, they will find for the defendant.

13. If the jury find from the evidence, that the land embraced in this suit was beyond the limits of the town of St. Louis, as said town existed under the French and Spanish governments, and that on the 13th June, 1812, it was not any part of the land inhabited, used or laid out for the purposes of said town or its inhabitants, they will find for the defendant.

14. If the jury believe from the evidence, that the land in question was, during the French and Spanish governments, outside of the town of St. Louis, and was, as late as 13th June, 1812, an unappropriated and vacant space beyond the regular limits of said town, they will find for the defendant.

15. That the act of congress of 13th June, 1812, entitled "an act making further provisions for settling the claims to land in the territory of Missouri," does not reserve, for the use of schools in towns and villages therein mentioned, any land which had not been made a town or village lot, out-lot or common field lot previously and by proper authority.

16. If the jury find from the evidence, that the survey of the out-boundary line of the town of St. Louis, under the act of 13th June, 1812, could have been run so as to include the out-lots, common field lots and commons thereto belonging, and exclude the land in this action sued for, they will find for the defendant.

17. If the jury find from the evidence, that the land in question, before and on the 13th June, 1812, was a vacant space, not embraced within the streets of St. Louis, nor included among the regular lots of the village, and that it had never been a common field lot, then the said act of congress did not reserve it for the support of schools.

18. That the town or village lots, out-lots and common field lots reserved for the use of schools by the act of 13th June, 1812, and relinquished by the act of 29th January, 1831, to the inhabitants of the several villages therein mentioned, was a reservation to the villages, as they were under the French and Spanish governments, and the act of the legislature incorporating the plaintiffs, to be elected by the inhabitants of the city of St. Louis, as it stood incorporated at the passage of said act, is ineffectual to divest the trust fund from the ancient inhabitants of the village of St. Louis to the modern city of St. Louis, and the authority in the act, authorizing the election of the board of directors by other than the grantees, is null and void, and the plaintiffs cannot maintain this action.

19. The preëmption to Robert Duncan conferred a valid claim under the preëmption laws, and he, having settled on the land before any survey thereof was actually made, is entitled to hold it; and the persons deriving title from said Duncan have a title superior to the plaintiffs.

20. The court is requested to instruct the jury, that the paper offered in evidence by the plaintiffs, marked No. 2, and headed General Land Office, August 1st, 1845, and signed James Shields, commissioner, and addressed to "Register and Receiver, St. Louis, Missouri," does not invalidate or affect the entry of the land in question by Robert Duncan, under the preëmption laws of the United States, and that the same is no evidence in this cause, and is excluded from the consideration of the jury.

21. The survey attempted to be given in evidence by the map marked "X," is not of itself any evidence that the land

in question, or any part thereof, was reserved for the use of schools by the act of congress of 13th June, 1812.

22. The court is requested to instruct the jury that an outlot and common field lot, as mentioned in the act of congress of 13th June, 1812, mean the same thing.

23. The document, purporting to be an assignment, or setting apart of the land in dispute by the surveyor general, for the use of schools, shows no title in the plaintiffs, without other evidence, establishing the fact that the said land belongs to the class reserved by the act of congress of June 13th, 1812.

24. The papers offered in evidence by the plaintiffs, purporting to be evidence taken before Recorder Hunt, are no evidence in this case.

25. The copy of the record from the Court of Common Pleas, purporting to erect a corporation, is no evidence of any such corporation, the court not having any jurisdiction to create it.

To this refusal to give the instructions asked, defendant excepted. All instructions asked by plaintiffs were refused, and the court gave the following, to which defendant excepted :

“The court is asked to instruct you, that the claims of the respective parties to the land in controversy must depend mainly upon the question, whether the land was reserved for the use of schools by the act of 13th June, 1812. In this view, the court concurs ; but, without advising you more at large upon that subject, as requested, gives the case the direction indicated by two of the propositions submitted, one on either side, designed to effect a comparison between the titles of the parties. These are as follows : on the part of the defendant, ‘that the preëmption to Robert Duncan conferred a valid claim under the preëmption laws, and that, he having settled upon the land before any survey thereof was actually made, is entitled to hold it, and that the persons deriving title from said Duncan have a title superior to the plaintiffs.’ On the other hand, it is insisted that ‘the title of the plaintiffs, under the act of the surveyor general, designating and setting apart the ground in controversy to the plaintiffs, is superior to the title



of the defendant under an entry with the register and receiver of the land office.' And of this opinion is the court. The jury is therefore instructed that, upon the titles exhibited in testimony by the parties, the plaintiffs are entitled to recover.

"The court adds, that the defendant has the right to impeach the title of the plaintiffs, the same, and to the same extent, as if the entry of Duncan, under which he claims, had not been vacated by the commissioner of the general land office. And the court further instructs the jury, that no evidence has been adduced on the part of the defendant, competent to invalidate or overthrow the plaintiffs' title; therefore the jury should find for the plaintiffs."

There was a verdict for plaintiffs, and defendant brings the case here by writ of error.

*J. Spalding*, for plaintiff in error.

I. Cancelling the entry by Duncan did not divest his right. 9 Mo. 323. *Wilcox v. Jackson*, 13 Pet. 498. 9 Pet. 117. 12 Mo. 12.

II. The instruction given by the court is erroneous: 1. In asserting that no testimony had been given by the defendant, competent to impeach or invalidate the plaintiffs' title. 2. The survey of the out-boundary line, and designation for use of schools, do not, as against defendant possessing under a sale from the United States, make a *prima facie* title. 3. If the survey and designation are presumed correct, so also are the acts of the register and receiver in allowing the pre-emption, and of the surveyor in locating it as a fractional section; so that there is presumption against presumption, thus leaving the matter *in equilibrio*. *Hammond v. Schools*, 8 Mo. 65. *Trotter v. Schools*, 9 Mo. 69. *Eberle v. Schools*, 11 Mo. 247. Acts of 26th May, 1824, and of 27th January, 1831, supplemental to act of 13th June, 1812. 4. The out-boundary line raises no *prima facie* case, inasmuch as there is evidence impeaching it, indeed showing positively that it was wrong, in not embracing the Grande Prairie, Prairie des Noyers and Cul de Sac common fields. Like a witness, being discre-

dited in part, its credit is lost. 5. But there is evidence tending to prove that the out-boundary should have been so run, as not to have embraced the piece of land in question. 6. There was evidence tending strongly to prove that the land in controversy never was a village or town lot, common field lot, or out-lot, prior to December 20, 1803, nor even down to, and after the passage of the act of June 13, 1812. 7. But even if the out-boundary line and designation and setting apart make out a *primâ facie* case, still there was some evidence touching the legality of the same, which ought to have been left to the jury. Those acts of the surveyor and commissioner are not conclusive. *Eberle v. Schools*, 11 Mo., opinion of Judge Napton at pp. 264 and 266, and of Judge Scott, at p. 261. In 13 Pet. 498, the United States Supreme Court indicates how far reliance is to be placed upon the acts of the public land agents; that their acts are not binding in regard to the fact, *whether the land was public land, or whether it was of the description which would authorize their act appropriating it*; that those facts are open to inquiry in courts of justice, in cases involving the title to the land. 8. The testimony of Cerré, Paul, Cozzens, Simpson and the old map of the town, and other maps shown on the trial, make it appear, with reasonable certainty, that there were no town or out-lots between the Cerré or Soulard plantation, on the south, and the Chouteau Mill tract on the north, and the Mackay tract on the west. There is no evidence from the land records of the country, or oral, tending to show that there ever was a lot in that space. The town, as incorporated in 1809, or as it existed under the American government, is not the town referred to, when the act of congress speaks of town or village lots, out-lots, or common field lots, but the Spanish town. The lots intended by the act were such as were created before the change of government. 11 Mo. 265. The act of June 13th, 1812, shows it in its caption and provisions; and this act is one of a series of acts for the relief and benefit of the people of the newly acquired territory. The words in the first and second sections

are the same. If, therefore, the first *confirmed* only lots existing under the Spanish government, the second *reserved* only such. Vacant, unappropriated spaces were neither confirmed nor reserved by that act. There was no authority to make lots or out-lots or common field lots, after the change of government, until the act of June 13th, 1812, was passed.

The entry of Duncan was regular and gave title, as against the United States ; so that the instruction is not sustained on the ground that the defendant's title was void on its face. In fact the court admits this in its instructions. Acts of congress of May 29th, 1830, April 5th, 1832, July 14th, 1832, and June 19th, 1834. U. S. S. pp. 420, 503, 603. *Pettigrew v. Shirley*, 9 Mo. 687.

The effect to be given to the survey of the out-boundary line of St. Louis, being of great importance in these cases of public school property and claims, I subjoin several observations thereon.

1. The act of congress requiring it, gives no effect to it, except to limit and describe the territory within which the "lots" are *granted* or *reserved*, by that act. It does not enact that all the lots within that boundary, are *hereby granted* for the use of schools, and this court, in the case of *Hammond v. Public Schools*, 8 Mo. Rep. 65, held that the *reservation* gave no vested rights. 2 U. S. S. 748-49-50, act of congress of 13th June, 1812.

2. The act of May 26th, 1824, 4 U. S. S. 65, provides for making proof of inhabitation and cultivation as to lots of individuals, and size, &c., of the lots, "so as to enable the surveyor general to distinguish the private from the vacant lots," &c. This does not *give title* or make the survey evidence. The second section requires the surveyor then "to *survey, designate* and *set apart* to said towns and villages respectively so many of the said vacant town or village lots, out-lots and common field lots for the support of schools," as the President should not have selected for military purposes, and not to exceed one-twentieth of the whole land included in

the general survey of each town, &c. But this section fails to state what effect this should have. It does not enact that it should give title.

3. The act of 27th January, 1831, 4 U. S. S. 435, merely gives to the respective towns the title of the lots *reserved for the use of schools* in the act of 13th June, 1812; but makes no reference to the survey of the out-boundary line, and gives it no effect whatever.

4. So that it appears that there is no statutory provision whatever, expressly or impliedly making this survey a title, or even any *evidence* of title.

5. On what grounds of principle, then, is it *primâ facie* evidence of title? The proprietor of land sells a piece, and makes his deed, and surveys the part sold. This, perhaps, as between him and his grantee, would be *primâ facie* evidence against him, that the survey and location was the piece contained in his deed. It is in the nature of a formal admission on his part. It may be, perhaps, *primâ facie* evidence against any subsequent purchaser from the same grantor, as such purchaser has knowledge of the previous deed and location, and he takes under the same grantor, and only the grantor's rights, and stands in his shoes. But how can such survey be *primâ facie* evidence against a previous purchaser from the same grantor? And especially, if such previous purchaser's claim had been previously surveyed for him by the grantor? When the rights of third persons are concerned, a surveyor cannot affect them by a survey. 9 Mo. Rep. 603.

6. This doctrine of *primâ facie* evidence of title, given to an official survey, seems based upon the assumption, that the *land was of the character required to authorize the survey*, and here lies the whole dispute. Was it a *vacant lot*, or was it a *lot* at all, of any description? If you proceed first and show that it was a *town lot* or *out-lot*, then perhaps the *official survey of it* would be held *primâ facie* evidence of its being a vacant one, though even that I deny.

7. The same law of evidence is to be applied to this class of

cases as to others. If an individual sues for a town lot, it will not suffice to merely show an official survey of a confirmation to the original claimant, and then derivative title to the party, and why not? Because he must show *title*, and after *that* is shown, the official survey of the claim is *primâ facie* evidence of size and location. The survey was not made, nor intended by the law, to be in lieu of all title. So, he who claims under the act of 13th June, 1812, must prove title by proving cultivation or inhabitation, prior to 20th December, 1803; but this is not proved by production of the survey of the lot to him, as confirmed under that act.

8. Now the far greater portion of the *lots* and *out-lots* was *private property*, made so by the first section of the act of 13th June, 1812. The presumption, therefore, as to any given lot, would be, that it was private property, and not one of the *reserved lots*. In making the survey, the officer was not dealing with the public domain.

9. The *title* of the public schools depends upon the same fact as that of individuals; that is, on the fact that it was a *lot* under the Spanish government. The official survey of the lot for an individual does not prove this fact; and how can it prove the same for the public schools, unless you have one set of laws for individuals and another for this corporation.

10. Nor does it make any difference that, in the further proof, the individual has to prove an affirmative fact, *i. e.*, inhabitation or cultivation; and the public schools, in many cases, have to prove, or give *primâ facie* evidence of a negative, to-wit: that the lot never was *inhabited or cultivated*. The one is as easily done as the other, and if it were not, yet the fact, whether a *town lot* or *out-lot* is an affirmative fact, on which both titles depend. *That* fact is necessary to the title of both. Why then make the *survey* prove it in the one case, and not in the other?

11. The truth is, that *survey* is evidence of *boundary* and *location*, but never of *title*; and in principle, it never should be. *Survey* is only the *ascertainment* and *designation* of

*extent, size, shape and boundaries* of something previously existing. It does not itself *create* the thing. A *lot* or *tract of land* exists previously, as such *lot* or *tract*, and the survey is merely the *marking out* its extent, shape and limits; and so far as doing this, there is no objection to holding an official survey to be *primâ facie* evidence of what it purports to be; that is, of the boundaries of a previously existing *lot* or *tract*. But to hold that it goes far beyond this, and establishes the previous existence of such *lot* or *tract*, is to give an effect to it not warranted by the law, nor by the nature of such an official act. In the present case, the court below decided that the mere survey and setting apart proved that the land was a *lot* or *out-lot* under the Spanish government; and that, too, when it was a mere *ex parte* act, and when other officers of the government, equally trustworthy, had previously decided officially, that it was not a *lot* or *out-lot*.

12. It should be observed that the titles here do not depend on the *survey*, but on *previous grants*—*grants* made to *individuals* or to the *public* for the use of schools. So that the *surveys* in question are surveys of *previously existing lots*. Two matters are left to the department: *First*, whether a piece of land was a town *lot*, under the Spanish government; and, *second*, where is its true location, and what its size, shape and boundaries. The survey proper is the ascertainment of the last mentioned points. But it may be said that the department has acted, in *designating* and *setting apart* the lot, through the surveyor. But how can this alter the case? The principle is the same. Because a man, whether surveyor or commissioner, says that the title of this lot is in the schools, when its title, if it be a *lot*, had emanated years before, and when the question, whether it be a *lot*, is undetermined by any previous action of government or any judicial tribunal—that because such an assertion of title is made *ex parte* by the commissioner or surveyor, the claimant in possession is to be turned out, seems advancing to an alarming extent, in giving effect to acts of government officials.



13. Let it be remarked that all the *town lots* and *out-lots* had been disposed of long since, and granted by acts of congress, and, of course, the titles of them all vested in the grantees years before these surveys were made. The lots of individuals were granted to them in 1812, and the full legal title then passed and vested, as the Supreme Court of this state and of the United States have always held. The *lots* not so granted then were granted in 1831, and the legal title of them passed from the United States and vested in the several towns, so that the United States had conveyed away all the town lots and out-lots of St. Louis, before these surveys were made. Nothing existed there but private property; the proprietary interest of the government had ceased. How can the government, after this, authorize an officer to determine whether a particular lot belongs to A. or B.? The function of the government has ended, and it belongs to the courts to say who has the best title and where the respective boundaries of the lots are. If the government chooses to convey its lands through a section of country by one general act, without previous survey, how does it retain the right to interfere afterwards among the grantees, by its agents or ministerial officers, and prefer the title of one grantee to that of another?

14. See the great injustice of such a doctrine. The surveyor sets apart and surveys for schools a private lot. The owner a year or two ago could have proved his title by living witnesses, that is, he could have proved possession of it prior to 1803. But those witnesses have died. Of course the public schools, their *survey* being *title*, now take the lot. Making their survey *primâ facie* evidence of title, as it is, if you make it *primâ facie* evidence of a *vacant lot*, places it in the power of this corporation to disturb a great many proprietors, and do a vast deal of injustice, and its power in this respect is increasing daily.

15. The fact that the surveyor or commissioner is a sworn officer, doing his official duty, makes no difference. In making those surveys, he was running boundary lines between ad-

jacent proprietors, and that too, when the law does not declare that it shall have any effect ; and how can the United States interfere with titles here, which have already emanated to individuals, and by law declare the extent of their rights ?

16. Nor can it be said with truth that, in making the grants, they reserved the right of fixing boundaries thereafter. Their act merely makes it the duty of certain officers to do it ; and it should have been done while the United States were interested ; but it was not done. The government granted away all its interest and ceased to own any estate, and in that grant made no reservation.

*Haight and Leslie*, for same.

*R. M. Field*, for defendant in error.

I. The acts of congress of June 13th, 1812, 26th May, 1824, and 27th January, 1831, together with the designation of the land in controversy by the surveyor general, constitute a title in the public schools, conclusive on the United States, equivalent to a patent, and binding on all not having a paramount title at the time of designation.

The title of Kissell is a mere entry, not perfected by a patent ; and is inferior in dignity, and must yield to the title of the public schools. *Bagnell v. Broderick*, 13 Pet. 436. *Wilcox v. McConnel*, ib. 498. *Mackay v. Dillon*, 4 Howard, 421. *Les Bois v. Bramell*, ib. 449. *Menard's heirs v. Massey*, 8 Howard, 293. *Trotter v. Public Schools*, 9 Mo. 69. *O'Hanlon v. Perry*, ib. 808. *Eberle v. Schools*, 11 Mo. 249. The foregoing cases establish the propositions that an entry is inferior in dignity to a patent, and that a grant by congress is of equal validity with a patent.

The designation by the surveyor general, in pursuance of the act of May 26th, 1824, has precisely the same effect as if the designation had been contained in the body of the act. The defect in the act of 1812 was, that no means were provided for ascertaining the lots reserved. This defect was supplied by the act of 1824, and the duty was delegated to the surveyor general of designating and setting apart the vacant lots.

This duty, when performed, must, from its nature, bind the United States, and all their title in the land designated; and, taken in connection with the act of 1831, is effectual to pass the fee in the very land mentioned in the designation of the surveyor general. Accordingly, in *Les Bois v. Bramell*, where the effect of a designation of the St. Louis commons, under the same act of 1824, was considered, the United States Supreme Court decides that, "the laws [of 1812, 1824 and 1831] and the acts done by the United States in pursuance of them, we suppose, made and located the commons title as effectually as a patent could have done." This decision goes to the very point of the present case. See also the language of Judge Catron in *Menard's heirs v. Massey*, as to the effect of the survey of a confirmed claim.

The language of those judges who have advanced opinions adverse to the title of the public schools is not materially different from the foregoing, as to the effect of a survey. See opinion of Judge Tompkins in Trotter's case, and of Judge Scott in Eberle's case.

The necessary conclusion from these statements of the effect of a survey is, that the United States and their title are bound by the survey, and consequently the public schools occupy the same position as the United States, in respect to a party standing on a mere entry. The rights of the United States in this respect appear in the above cited case of *Wilcox v. McConnell*. The contrary conclusion involves a plain logical absurdity, in this, that the title of Kissell, which is confessedly inferior to that of the United States, becomes superior to that of the public schools, which, in its turn, is admitted to be superior to that of the United States; and practically, there would be no controlling title to the land in dispute, for Kissell would take it from the public schools, the United States from Kissell, and the public schools from the United States.

II. If the designation by the surveyor general were regarded merely as *primâ facie* or presumptive evidence that the land designated was within the grant by congress, still there was no

testimony adduced by the defendant below, competent to overthrow this *primâ facie* title, and the jury was properly instructed to find for the plaintiff. See *Kelly v. Jackson*, 5 Pet. Rep. 622. The defendant below introduced much testimony, tending to show that the land in dispute was without the Spanish village, and not a part of the common fields in recent times. Farther than this he did not attempt to go, and, for aught that appeared, the land was an out-lot belonging to St. Louis, and properly assigned to the public schools by the surveyor general.

III. There is ample evidence on the record that the land in controversy was embraced within the out-boundary directed to be run by the act of 1812; and that it was properly designated and set apart for the public schools.

*Firstly.* The town mentioned in the act of 1812, must be taken to be the one existing and as it existed at the date of the act.

1. This construction is the natural one.
2. It is altogether more consistent with a convenient practical execution of the law.
3. It is plainly suggested by the proviso to section second of the supplemental act of 1824.
4. It has uniformly been adopted and acted on by the heads of the land department of the government.

Under this construction, the present controversy is at an end; for it is not questioned that the land in dispute lies within the corporate limits of the St. Louis of 1812.

*Secondly.* But if the act of 1812 be construed, as referring to the town as it existed prior to 1803, the result will still be the same; for the land was clearly proven to be a part of the Spanish town and its dependencies.

1. It was part of the ancient commons of St. Louis, and continued to be claimed and used as such, till it was severed from the great mass of commons land by the intervening grants. The testimony of all the witnesses contained in the record, concurs in this, that in early days the commons ex-

tended quite round the village, embracing all the lots along the river, and also the land lying between Third street and the common fields. Several ancient deeds and grants will be found in the record, containing recitals and descriptions to the same effect.

2. The claim to this land, as commons, was abandoned as early as 1806, as appears by Mackay's survey, filed with the commissioners. And the land was not confirmed as commons, as is conclusively shown by the official survey of the commons.

3. Lying within the Spanish town, as it existed prior to 1803, the land in dispute was properly embraced within the out-boundary run by the surveyor general; and, being vacant, was properly designated for public schools, on the principle decided by this court in *Trotter v. Public Schools*, re-affirmed by a part of the court in *Eberle v. Public Schools*, and asserted by Justice Catron in *Mackay v. Dillon*.

The court is referred to the case of *Mobile v. Esglava*, 16 Pet. 234, in which it was held that a grant of *lots*, by act of congress, was effectual to pass *land* not subdivided into lots. See also to the same point, *Dunn v. City Council*, Harp. S. C. Rep. 189.

4. Even taking the term *lot* in the strict and technical sense adopted in the case of *Newman v. Lawless*, 6 Mo. Rep., the land in question was a lot; for it had fixed and definite boundaries by the lines of Soulard's, Chouteau's and Mackay's surveys, all of which were run by Spanish authority.

5. It was an *out-lot* belonging to St. Louis in point of local situation; for it was in close proximity to the village, carved out of the ancient commons, and the first of a series of lots, the last of which was confirmed as an out-lot, *eo nomine*. The first section of the act of 1812 describes out-lots as "adjoining" the town or village, from which it would seem that, in determining what is an out-lot, local proximity is to be regarded. See the plat of Shawneetown, prepared under the act

of 1811, and showing the contemporaneous construction, by the land department, of the term *out-lot*.

6. But it was an out-lot of Spanish St. Louis, in point of jurisdiction and authority; for it lay along a public road, which was under village control, and was itself subject to the regulations of the village syndics.

*E. Bates*, for same.

1. The United States, as the great proprietor and only law-giver over the subject, can dispose of its lands to whom it pleases, acting by what agencies and giving what evidences of title it pleases.

2. As the United States often grants lands to many persons in group, and embraces many classes of claims and interests in one compendious act, its grants of such character ought to be largely and liberally construed, to advance the known objects of the government, and ought not to be restricted by any merely technical rules, which possibly may apply to the contracts of private persons.

3. Assuming these principles, and considering the relations of the people of Louisiana to the United States, I submit that the act of congress of 13th June, 1812, (with its two supplements, of the 26th May, 1824, and 27th January, 1831,) disposed of all the interest and title of the United States, within the Missouri towns mentioned in the act.

4. As to the towns and villages mentioned in the act, they are described only by their names, and it is quite immaterial to the purposes of this suit, whether they did or did not exist in Spanish times. If they did, then they might have had inhabitants capable of enjoying the benefits of the first section of the act—the grant of titles to the possessors of private lots. If they did not, still, the town being in existence at the date of the act, the reservation of unappropriated lots for the support of schools therein, *in the future*, is perfect, without reference to past time.

5. It is a mistake to suppose that a Spanish town means



only a collection of dwelling houses and shops on lots and squares regularly laid out, with streets marked and established. In superficie, that is a very small part of a Spanish town, as known in history and recognized by the United States Supreme Court, in 12 Pet. Rep. 441, *Strother v. Lucas*. And see White's Compilation, vol. 2, Appendix I, p. 36. And the act of 1812 itself plainly declares that out-lots, common field lots and commons are *parts of the town*, by directing the out-boundary *of the town* to be so surveyed as to include them.

6. The word *lot* is generic, and no more implies any particular size or shape or defined boundaries, than does the word *tract*; it is not used in contradistinction to *farm*, as adverse counsel suppose in argument. On the contrary, hundreds of the old inhabitants had their *farms* upon the *out-lots and common field lots*.

7. The word *lot*, as used in the first and second sections of the act of 1812, may and ought to be construed differently. Individuals could claim, under the first section, such lots only (whether *in* or *out-lots*) as they had "inhabited, cultivated or possessed," and therefore could prove; and, by the supplemental act of 1824, they were required to prove the fact of their inhabitation, cultivation or possession of the lot, "together with its extent and boundaries. But the lots reserved for schools, by the second section, were vacant, unclaimed, unsurveyed, unknown in size, shape and boundary; and for that very reason, reserved by a parental government, for the education of the people. The court will take notice of the historical fact that there were no surveys of the King's domain in Upper Louisiana. So much as to the construction of the statutes.

We will now consider the acts of the officers under those statutes.

8. The survey of the out-boundary of the town is a public survey, about which no private person has any right to make a

question, because it is not, and does not purport to be a survey of any man's land. It is simply the establishment of a municipal boundary, by authority of the government. It is final and absolute, as to individuals, the land office and the courts. It was not made under executive orders (as other surveys, and especially those made under the supplemental act of 1824 are,) but by command of congress itself, in the terms of the act of 1812, addressed to the surveyor directly, and not through the general land office.

If the court should think the survey wrong, still it has no power to correct it: the court must take it for good, as it is, or reject it altogether, as a nullity. Therefore, although we may think it wrong, in this or that particular, still, as no one is authorized by law to review and amend it, it must stand as it is, till congress shall think fit to direct a change.

That the survey is *prima facie* evidence, is beyond dispute, having been over and over so determined by this court. See the cases of Hammond, of Trotter and of Eberle.

9. The act of the surveyor, under the direction of the commissioner of the general land office, assigning the particular land to the school board, is a perfect evidence of title, as far as the United States could give title—as good as a patent—and, like a patent, implying the fulfilment of all prerequisites, and dispensing with the proof of any.

It may safely be assumed, as a general truth, that hardly admits of exception, that the last evidence provided by the government, of its grants of lands, must, in its nature, be final and conclusive.

Not conclusive that the government has a right to the thing granted; but that, having the right, the act done is perfect to convey the right of the government. See 10 Pet. Rep. 731, *New Orleans v. United States*.

In most cases of grants of land by the United States, patents are provided for by law. But there are large classes of grants, in which no patents are provided for by law, and none

in fact issued. Patents are neither required nor issued for the vast number of lots confirmed by the first section of the act of June 13th, 1812.

GAMBLE, Judge, delivered the opinion of the court.

The present state of the decisions in this court, upon the questions discussed in this case, seems to require a more minute examination of them than would otherwise be thought necessary.

The reports of previous decisions contain such full extracts from the different acts of congress affecting the titles, that a brief statement of their provisions is all that will now be made.

The first section of the act of June 13th, 1812, (2 Stat. at large, 748,) by its own terms confirms the claims of the inhabitants of the several towns and villages in Missouri "to the town or village lots, out-lots, common field lots and commons, in, adjoining and belonging to the several towns or villages," requiring, however, in order to a confirmation of the lots, that they should have been "inhabited, cultivated or possessed prior to the 20th December, 1803." In the same section, it is made the duty of the principal deputy surveyor, "to survey or cause to be surveyed and marked, (where the same has not already been done, according to law,) the out-boundary lines of the said several towns and villages, so as to include the out-lots, common field lots and commons thereto respectively belonging."

The second section provides that, "all town or village lots, out-lots or common field lots included in such surveys, which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be and the same are, by the act, reserved for the support of schools in the respective towns and villages: provided the whole quantity of land, contained in the lots reserved for schools, shall not exceed one-twentieth

of the whole lands included in the general survey of a town or village."

The first section of the act of the 26th May, 1824, (4 Stat. at large, 65,) makes it the duty of the owners of lots which were confirmed by the act of the 13th June, 1812, to prove, within eighteen months after the passage of the act, before the recorder of land titles, the inhabitation, cultivation, or possession of their lots, and the boundaries and extent of each claim, so as to enable the surveyor general to distinguish the private from the vacant lots appertaining to the said towns and villages.

The second section of this act makes it the duty of the surveyor general, immediately after the expiration of the time allowed for the private owners to prove the inhabitation, cultivation or possession of their lots, to proceed, under the instructions of the commissioner of the general land office, to survey, designate, and set apart to the said towns and villages respectively, so many of the said vacant town or village lots, out-lots and common field lots, for the support of schools in the said towns and villages respectively, as the President shall not, before that time, have reserved for military purposes, and not exceeding one-twentieth of the whole lands included in the general survey of such town or village.

On the 27th January, 1831, an act of congress was passed, for the purpose of transferring the title of the United States to the property belonging to the several towns and villages, which had been acted upon by the act of the 13th June, 1812, 4 Stat. at large, 435. The first section relinquishes to the inhabitants of the several towns and villages, all the right, title and interest of the United States in and to the town or village lots, out-lots, common field lots, and commons confirmed to them by the first section of the act of the 13th June, 1812. The second section relinquishes all the right, title and interest of the United States in and to the town and village lots, out-lots and common field lots, in the state of Missouri, reserved

for the support of schools in the respective towns and villages, by the second section of the act of the 13th June, 1812.

The title paper exhibited by the public schools for the lot now in controversy, is a document issued by the surveyor general for a larger piece of ground assigned to the public schools under the instructions of the commissioner of the general land office, which includes the lot involved in the present suit. The action of these officers of the government professes to be under the different acts of congress before mentioned.

The title of the defendant, Kissell, is under a purchase from the government, made in the name of Robert Duncan, in the year 1835, under the preëmption laws.

The other facts in the cause, which are material to the decision of the questions arising in the case, will be noticed as the questions are considered.

1. The question is presented upon the facts now stated, whether the legal title to the property has passed from the United States, and to whom? In the case of *Hammond v. The Public Schools*, 8 Mo. Rep. 65, it was held by this court, that the reservation of property for the use of schools, made by the second section of the act of June, 1812, did not operate to transfer any title from the United States in the property so reserved, and this opinion is approved in the subsequent cases in which these school titles have been considered. In the same opinion, it is intimated that the title of the United States to the property reserved by the second section of the act of 1812, passed by the act of the 27th January, 1831, and this seems to be conceded in all the subsequent cases. In the present case, it is contended for the appellant, Kissell, that the act of 1831 so operates to pass the title, that no document from any public office is required to be issued; and if one is issued, it is of no further use than to furnish evidence of the subject upon which the act has operated.

It is also insisted, that the act of 1831 supersedes the act of 1824. When we observe the titles of the two acts, we will see that the latter was not designed to supersede the first. The

act of 1824 is entitled "an act supplementary to an act passed on the 13th June, 1812;" the act of 1831 is entitled "an act further supplemental to an act entitled, &c., passed the 13th June, 1812." If the provisions of the two are inconsistent, then the latter repeals the former, but only so far as they are inconsistent. If they can stand together, it is obviously the general intent of congress that they should both stand.

The act of 1831, in its first section, is a relinquishment of the right of the United States to the property confirmed by the act of 1812. This was only consummating the title, of which evidence was to be given under the act of 1824 by the certificate of confirmation issued by the recorder, so far at least as property of individuals was confirmed. So far as the commons of the different towns were concerned, the act of 1824 had required the surveyor to survey and designate them, and the act of 1831 was a relinquishment of the title of the United States to them. The act of 1824 had required the survey and designation of the school lots, under the limitations contained in the act of 1812, that is, that they should be vacant, not rightfully claimed by individuals, that they should not be reserved by the President for military purposes, and that they should not exceed one-twentieth of the whole property in the general survey of the town. The act of 1831 was not intended to dispense with this survey and designation, nor with the ascertainment by the officers of the government, of the facts upon which the designation was authorized to be made under the act of 1824.

No reason is perceived for construing the act of 1831, in the clause relating to school lots, differently from those clauses which relate to the commons, and the lots of individuals. If there had been no survey and designation of the commons under the act of 1824, the act of 1831 was not designed to dispense with that requirement of the former act, and leave the towns at large to ascertain and assert their claims to commons as best they might, but was intended to perfect the title of the towns to the commons, surveyed and designated as the former



act required. The whole difficulty in the construction of these acts, is produced by the fact, that the officers who were required by the first acts to perform certain duties, had not performed them when the last act was passed. If the property now claimed by the schools had been designated and set apart before 1831, there would be but little difficulty in arriving at the conclusion, that the act of 1831 operated as a relinquishment of the title of the United States to this particular property; but because neither the out-boundary was surveyed, nor the property set apart to the support of schools before that time, it is now contended that the act of 1831 dispenses with all the requirements of previous acts, and throws the title to property claimed for the support of schools open, to be asserted and maintained without any documentary evidence as they may best be able, in courts of justice. Such is not the design of the act, and the construction given to it in *Boyce v. Papin*, 11 Mo. Rep. 16, shows that the act of 1824 is still to be executed by the surveyor, by setting apart the school property, and when it is executed, the act of 1831 operates upon the title.

The act of 1824 was, in part, intended to remedy the evils introduced by the act of 1812, which confirmed titles to property, without any documentary evidence of title existing, by which the property thus confirmed could be distinguished from that which remained public; and it is not to be supposed that congress designed by the act of 1831, either in relation to commons, or the property appropriated to the support of schools, to reproduce the very evils which the act of 1812 had introduced, and the act of 1824 had at least partially cured.

It may then be taken as true, that the designation and the act of 1831, are to be taken together, in considering the effect upon the title.

It cannot be doubted that, under the acts of 1824 and 1831, and a designating and setting apart of property to the schools, by the surveyor general, under the instructions of the commissioner of the general land office, the whole title of the government, legal and equitable, passes. It is believed that such

would be the effect under the act of 1824, but in order to remove all doubt upon the question, and out of abundant caution, the act of 1831 relinquishes the right, title and interest of the United States. When the document is produced which is required under these acts, the party has produced all that is necessary to show that the title of the government has passed. He need not go back to show the progressive steps in the title. This is a familiar rule, applicable not only to patents, but to inferior evidences of title. All are familiar with the repeatedly declared rule that when a patent is produced, all previous steps required by law before its emanation are presumed. *Polk's Lessee v. Wendal*, 9 Cranch, 87. 5 Wheat. 293. *Patterson v. Winn*, 11 Wheat. 383. The authority given to the President to direct the sale of the public lands, by the act of March 3d, 1811, is for the sale of such land as "shall have been surveyed in conformity with the 8th section of the act." This is the language of other acts conferring this authority, and yet when a certificate of purchase is produced in our courts, we never expect the party to produce evidence that the survey has been made in conformity with the requirements of the act. Nor do we expect the production of a proclamation made by the President, without which the register and receiver has no authority to sell lands. All such directions of the law are presumed to have been complied with. And when in this case the party produces the designation and setting apart to the use of schools of a particular lot, and the act of 1831, relinquishing the title of the United States, he has shown a legal title to the property, complete in form, and it devolves on the opposing claimant to defend himself, by showing a better title, or that that which is set up against him is void, a mere nullity.

2. The defendant's title in the present case, is one that cannot stand in opposition to that of the schools, if the documentary evidence of the latter be effectual to pass the title of the United States, because a purchaser from the register and receiver, whether he has made the purchase under a preëmption

claim, or by ordinary entry, has no title that can be set up in an action of ejectment against the United States, or the grantee of the United States holding the legal title. *Bagnell v. Broderick*, 13 Peters, 436. *Wilcox v. McConnel*, ib. 498.

3. The defendant, then, must rely upon impeaching the plaintiffs' title, by showing it to be void, for if it have in it defects or irregularities only, in the action of the officers, they will not avail the defendant in this action.

It is evident that some confusion may arise in the consideration of the objections made to the plaintiffs' title, from the fact that on the trial in the court below, the plaintiffs gave evidence beyond that which was necessary to the support of their action, and this evidence was objected to by the defendant, and in the view now taken, this evidence must be relied on by the defendant, to impeach the plaintiffs' title.

4. The first objection to the title of the plaintiffs is, that the survey, designation and setting apart of this property for the support of schools, is invalid upon its own face. It is in these words :

*" Office of the Surveyor of Public Lands in the States of Illinois and Missouri :*

*" St. LOUIS, 15th June, 1843.*

*" Under the instructions of the commissioner of the general land office, the piece of land, the survey of which is herein platted and described, has been legally surveyed, and under the instructions aforesaid, it is hereby designated and set apart to the town (now city) of St. Louis, for the support of schools therein, in conformity with the second section of the act of congress, approved the 26th May, 1824, entitled an act supplementary to an act passed on the 13th day of June, 1812, entitled an act making further provisions for settling the claims to land in the territory of Missouri ; the said piece of land hereby designated and set apart as aforesaid, is situated within the bounds of the survey directed to be made by the first section of the act of the 13th June, 1812, aforesaid, so*

as to include the town lots, out-lots, common field lots, and commons of the town of St. Louis, and is also within the limits of the said town of St. Louis, as it stood incorporated on the 13th June, 1812, and does not, together with all other land designated and set apart to the town of St. Louis, for the support of schools, under the aforesaid second section of the act of congress of the 26th May, 1824, amount to one-twentieth of the whole lands included in the general survey directed to be made of said town of St. Louis, by the aforesaid first section of the act of congress of the 13th June, 1812; the said piece of land was not, so far as the records of the office show, rightfully owned or claimed by any private individual on the said 13th day of June, 1812; nor was it held as common belonging to the said town of St. Louis; neither has it been reserved by the President of the United States for military purposes."

Then follows a plat and description of land surveyed.

It is objected, that it does not appear by this document, that the land thus set apart, is, or ever was, in whole or in part, a town lot, out-lot, or common field lot, in, adjoining or belonging to the town of St. Louis, included within the survey of the out-boundary of the town, and reserved by the second section of the act of 1812. It is certainly stated, with great clearness, that "it is included within the bounds of the survey directed to be run by the first section of the act of 1812," as well as within "the limits of the said town of St. Louis, as it stood incorporated on the 13th day of June, 1812." Here is a reference to the boundary of the town, as ascertained under the first section of the act of 1812, and to the boundary run in conformity with the corporate limits, and in whatever way it is ascertained, this ground is said to be within the boundary.

It is next objected, that the document does not show on its own face, whether the property was set apart to the support of schools, as a town lot, out-lot, or common field lot, belonging to the town. This is not admitted to render the act invalid, for when the officers of the government, entrusted to act upon a

particular species of property, give the evidence of their action upon any given piece of property, it will be intended to be within the scope of their authority until the contrary appears.

5. The next objection of the defendant, now plaintiff in error, is founded upon a survey, professing to be a survey of the boundary of the town of St. Louis. The plat and description of this survey, professes to be a plat and description of the "survey of the boundary lines of the town (now city) of St. Louis, in the territory (now state) of Missouri, as it stood incorporated on the 13th June, 1812, including the out-lots, common field lots of the common field of St. Louis, and the commons thereunto belonging, made in pursuance of the first section of the act of congress, approved 13th June, 1812, entitled an act making further provision for settling the claims to land in the territory of Missouri."

The objections to this survey will be considered in the order in which they are presented. First, it is said, that it professes to be based upon the corporate limits of the town as they stood on the 13th June, 1812, and that the act of congress of that date had reference to the limits of the Spanish town as it existed at the change of government, and consequently the survey or plat is erroneous, and could not be the basis of any legal designation of property for the use of schools. When we examine this proposition, it must be with the map before us, that we may see its effect. The survey to be made, is of the out-boundary of the town, so as to include the out-lots, common field lots and commons.

Now it is manifest that if the town, as incorporated, must, according to its own limits, be within the out-boundary required to be run by the act of 1812, then the reference in the survey (which includes the lots and commons) to the act of incorporation, does not, in any degree, affect the correctness of the out-boundary actually run. Suppose the incorporation, instead of extending over a considerable territory, had been confined to the actually inhabited part of the town, and that the survey of the out-boundary, including the lots and com-

mons, had, in such case, referred to the town as incorporated; when it appeared by the survey that the same space thus incorporated would, of course, be included in the general survey, can it be doubted that the survey would be held valid, notwithstanding such reference to the act of incorporation. The mere reference to the incorporation does not, of itself, show that the survey and plat are erroneous.

But it is objected, that the act of incorporation includes some territory that would not be included in a correct survey of the out-boundary as required to be run under the act of congress, and the surveyor has conformed to the act of incorporation, by including such territory. It may be answered that, in the main, the lines run are those required to be run under the act of congress; and this error (if it be one) does not so invalidate the survey, that land which is properly included cannot be legally assigned and set apart for the use of schools. It is not believed that such would be the legal consequence of such an error. If a survey is made in such manner that an error in it does not affect the rights of the parties at present litigating about a portion of the land embraced within the survey, the error does not vitiate the survey, so far as their rights are involved. If the land in controversy would be embraced in a correct survey of the out-boundary, then any alleged error in a part of the survey may be disregarded. In other words, the objection to the survey, to be valid, must be one that goes to the question, whether the land in controversy is correctly included in it. Nothing is said, nor designed to be said, upon the question, whether the incorporated town of 1812 or the Spanish town of 1803 is the town referred to in the act of 1812, because such question is not thought to be material to this case. Now, if this survey is examined in connection with all the evidence in the case, there is nothing discovered on which its correctness can be impeached, so far as the fact of including the land now in controversy is concerned. When we look to the law under which it was made, we find that the surveyor was required to survey and mark the out-boundary of the town, so



as to include the out-lots, common field lots and commons, where the same had not already been done according to law. This out-boundary might be a line that had already been surveyed and marked, or one that had never been surveyed and marked, or one that had in part only, been surveyed and marked. It was not required of the surveyor that there should be any work in the field in making the survey, where the line called for by this act was already ascertained and marked in the known and recognized surveys in his office. The survey of the out-boundary was not the survey of any tract of land for an individual. It was a survey of the exterior boundary of a town with its dependencies, its commons, in which all the inhabitants were interested, and the out-lots and common field lots in which those inhabitants were interested who were engaged in agriculture, or who owned land that had been held or used for that purpose. The design of the act was, that such out-boundary, though called the "out-boundary line of the town," should be so run as certainly to include the out-lots, common field lots and commons "belonging to the town;" and in running this boundary at the time it was first commanded to be run, no person was interested but the government on one side, and the inhabitants of the town on the other. Whether it should include a greater or less extent of territory—whether a particular piece of vacant ground should be included or not, could, at that time, only interest those parties; nor was the right of any party, who then claimed title to a piece of ground, affected by the fact, that it was included within such line, for, if he rightfully claimed it then, his right to it would still continue.

7. The surveyor, in performing the duty in relation to the boundary, was, of course, to ascertain from all sources of information, what land was to be embraced within the survey, either as out-lots, common field lots, or commons. He was then to run one boundary line, including all the land of either description. That the act contemplated one continuous out-boundary line, and not separate surveys of the town, and of

the common field lots, out-lots and commons, is evident from the direction to survey an out-boundary of the town, *so as to include* the lots and commons thereto belonging, and from the limitation in the proviso to the second section, of the quantity of land reserved for the use of schools, to one-twentieth of the whole lands included in the "general survey" of the town.

In the discharge of this duty, the surveyor, as appears from the survey before us, commenced at a point on the river where the common fields came to the stream, and running around the common field of St. Louis until he intersected the line which was part of the limits of the incorporated town, he followed that line until he came to the line of the commons, and then, following the line of the commons, he ran on to the river, and with the river to the beginning. The effect of running the line on the west, for a short distance, so as to leave the line of the common field, and pursue that of the incorporated town, could have no effect upon the question, whether the premises in controversy are rightly included in the general survey, and whether the survey was, in that particular, erroneous or not, does not affect the title to the premises. When the surveyor arrived at the river, at the south-east corner of the commons, he followed the river as the closing line of the survey, because on the river were lots which had been confirmed as out-lots of the town. Such were that confirmed to Susannah Dubreuil, under Sarpy, lying below the town, marked survey No. 374, and that to Mullanphy, under Eglise, above the town, and other pieces which had been granted by the Spanish Lieutenant Governor, bounded by the river, and which appear to be of the same description of tracts or lots. It will be seen, on examining the survey, that the river is taken as the eastern line, as well where it is the line of the incorporated town, as for more than a mile above the point on the river from which the line of the corporation commences.

8. Taking this survey, then, to have rightly included the premises in controversy, we come to the most difficult question

in the case, which is, whether the property assigned to the public schools was of that description which, under the second section of the act of 1812, was reserved for the use of schools. Upon this question, there has been not only a difference of opinion among the judges who have sat in this court, but the same judges have sometimes doubted the correctness of opinions they had before expressed. The question, when generalized, is, whether all vacant ground found to be within the survey of the out-boundary, was intended to be reserved for the use of schools, or whether the reservation is confined to such ground as had, before the change of government, been actually designated and in some mode separated from other property, so as to be a town lot, out-lot, or common field lot, under the Spanish government. In the case of *Trotter v. The Public Schools*, 9 Mo. Rep. 69, it was distinctly held, that the intention of congress was to reserve all the vacant ground included within the survey of the out-boundary. In *Eberle v. The Public Schools*, 11 Mo. Rep. 257, a different view of the question is taken by one of the judges, who held that the reservation did not extend to any vacant spaces within the general survey, but only to such parcels of ground as were known as "lots" in the sense in which that word was applied to the lots confirmed. Another judge, maintaining his first opinion, that whatever vacant ground was included in the general survey, was reserved for schools, expressed the opinion that the out-boundary should include nothing but the lots and commons, as the lots were known under the Spanish government.

Judge Tompkins, who was in all phases of this question, the most earnest and almost vehement supporter of the opinion, that no property could be legally assigned and set apart for the use of schools, except that which, prior to the 20th December, 1803, had, by the action of the Spanish authorities, assumed the definite form and shape of town lots, out-lots, or common field lots, remarks, in his separate opinion given in *Hammond v. The Public Schools*, 8 Mo. Rep. 86, "from all that I

have been able to collect of the practice of the Spanish authorities at St. Louis, as well from the testimony in this cause as in others that have been in this court, they never, for many years, did lay out lots, but on the application of those who demanded them, either for cultivation or residence. If that be the case, it necessarily follows, that there would be no vacant lot about or in St. Louis, unless it were abandoned by the person for whom it had been laid out." Again, at page 87, he says: "I therefore conclude, that congress did not intend to give to the town of St. Louis any land, except what was known and marked out by survey of the proper officer, as a town or common field lot."

So far as known, the town was not laid out, as is common at the present day, by a survey of a tract of land into squares and lots, with regular streets running through the tract thus laid out, and intersecting each other. And on the copy of the old map in the recorder's office, which was drawn by Auguste Chouteau, exhibiting the line of fortification, it is apparent from the certificate of the recorder, that there was, when that map was made, no projection of cross streets west of Third street, so that whatever of the Spanish town had existence subsequently, west of that street, was created alone by grants. Now, if, instead of the town having definite boundaries by a previous survey of a limited space of ground into squares and lots with streets, there was a piece of land bounded on the west by the common fields, into which the streets were to be projected, and where lots were to be granted upon such projected streets as they were asked for from the government officers, it is difficult to find any good reason for saying that such ungranted residuum cannot be treated as town lots; and if it exist now, why it should not now be divided into appropriate squares and assigned to the schools, or assigned as a whole.

Or, if we suppose that a tract existed within the common fields, which never was a common field lot, in the sense of having ever been granted or surveyed as such, but was a space left ungranted in the common field, because it was unfit for

cultivation, but having the same east and west lines as the common field lots granted, and being in between those which were granted and surveyed, it has the same shape as those lots that were surveyed—was it then a common field lot? It is not supposed that there would be any difficulty in saying, that it clearly comes within the intention of the act of congress in reserving such land for the use of schools, although it never had been surveyed.

9. It is altogether probable, that, in relation to the inconsiderable villages existing in the territory of Missouri as early as the year 1812, which had their origin under the former government, the congress of the United States had but very limited information; and that but little was known of the manner in which the property in and around these villages was held and occupied. There were no public offices, in which, as with us, connected maps and surveys would exhibit the situation and size of the villages, or the position and relations of the different tracts of land in which the villagers were interested. The information upon which congress must act could only be obtained from intelligent individuals, in whom the government could place confidence. The information upon which the act of June, 1812, was based, was obtained from Mr. Penrose and Mr. Riddick, one a commissioner, and the other the secretary of the board, which had just then closed its labors. The information was contained in letters addressed to the secretary of the treasury and to the chairman of the committee on public lands, which will be found in the second volume of State Papers by Gales & Seaton, 448 and 451. These letters have been so often referred to, and parts of them copied in former opinions, that they will not now be copied. In them is found the idea of the out-boundary, and the confirmation of individual claims, and the reservation of vacant property for the support of schools. The congress may have supposed that the property belonging to the villages was in such compact shape, that an out-boundary line would include nothing but town lots, out-lots, common field lots and com-

mons, and the probability is, that such was their belief. In that view, the act was so constructed as to dispose of all within the out-boundary directed to be run, and it is supposed to be the clear intent that all within the out-boundary should be disposed of, either to individuals, or to the aggregate inhabitants, for commons and the support of schools. This is perfectly apparent from the descriptions of property directed to be included within that boundary. But when it is discovered that a boundary, so run as to include the property thus mentioned, will also include other property, which had not been divided into lots, there is no warrant in the law, either to refuse to run the boundary, or to break up the survey into separate surveys of the town, and of the out-lots, and common field lots, and commons, in order to avoid including such property. When it is so run as one boundary, the vacant property included within it, is still within the general intent of the act, which, as before stated, is to dispose of all property thus included.

10. But the question then arises, whether the language of the act admits of our giving effect to this general intent. The reservation is, of "all town or village lots, out-lots or common field lots included in the survey, and not rightfully owned or claimed by any private individual, or held as commons belonging to the towns or villages."

As far as appears upon the evidence in the case, there has been no act of the Spanish officers in relation to this property, surveying it as a lot of any description, otherwise than by surveys of the adjoining property which bound it on all sides but the one which fronts the river; nor is there any declaration, or expression, in relation to it, found in any deed, grant, survey, or other document made under the Spanish government. It is claimed that it comes within the reservation as an out-lot. Now it is true, that if an inhabitant of the town had asked the Lieutenant Governor to grant this ground to him, that he might pasture his horse or his cow in it, it would in all probability have been granted to him, and then, because of its close proximity to the town, and its relation to other de-



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Kissell v. St. Louis Public Schools.

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pendencies of the town, it would in all probability have been confirmed to him as an out-lot of the town. Such certainly has been the fact in relation to other property farther separated from the town, and having no more connection with any other lots of like description, as appears as well by the examination of the recorder's report, confirmed by the act of 29th April, 1816, as the action of the recorder under the act of 26th May, 1824. Now, if this lot would have been properly described as an out-lot, upon its being granted to an individual, and might, consistently with the practice of the government, have been confirmed to the individual claimant as an out-lot, is it less an out-lot within the true intent of this reservation, because it never was granted but remained vacant? The term "out-lot" is said to be of American origin, and to be unknown to those who preceded us in the possession and government of this country. If this be so, we would naturally look for an American interpretation of it, and if the public authorities, from congress to the recorder, have applied it to property situated in relation to the town, just as that now in controversy was situated, we would have the signification of the term conveyed in the most forcible manner. It is conceded in the argument filed for the plaintiff in error, that the recorder has in his reports designated not only common field lots, but grants elsewhere near the town, as "out-lots." These reports have been confirmed by congress, and persons hold the property thus confirmed to them as out-lots. Now, this language thus used in the reports, applies to property situated, some below this piece on the river, some above the town, and to one piece in the commons entirely unconnected with any other survey, and if this exposition of the term is to be taken as that which the government itself gives, it would seem at least to justify the commissioner of the general land office and the surveyor, acting under his instructions, in setting apart this property for the support of schools. It is certainly a very doubtful position, that the property which is reserved is only that which had been actually surveyed and divided off into lots

by the Spanish government. In the midst of the conflicting opinions which have been expressed in relation to the extent and subjects of the reservation, great influence should be allowed to the action of the land department of the government, in the recognition of the right of the inhabitants to hold this and other property similarly situated, for the support of schools. The department has recognized this property as reserved by the act of 1812. It is true that it is not said in any of the documents that it is a town lot, or an out-lot, or a common field lot, nor was it necessary, in order to pass the title, that such statement should be contained, either in the instructions of the commissioner, or in the designation of the surveyor.

The department has acted upon the opinion, that whatever was rightly embraced in the survey of the out-boundary was intended to be disposed of by the acts of congress, and having recognized and approved a survey that includes the premises in question, the result was readily attained, that this property, not being rightfully claimed by any individual, was to be appropriated to the support of schools. Judges sitting in this court have concurred in that opinion, and it would only be upon the clearest conviction that it is erroneous, that a contrary judgment should now be pronounced.

It is to be observed that the shape in which the objections now appear, is that of objections to the validity of a title clothed with the forms of law. If they are not in their own nature legal objections, or if there is not evidence in the case on which they can be raised, they must be ineffectual and the title of the plaintiffs must prevail.

The points considered and decided, and for which the reasons are before given, are the following :

1. It is maintained that the survey, designation and setting apart for the support of schools of a piece of property described to be within the out-boundary of the town, as directed to be surveyed under the act of 13th June, 1812, taken together with the act of 1831, make a regular formal title to the property so set apart.

2. That the entry of the same land with the register and receiver must yield, in an action of ejectment, to the title under such designation.

3. That if the purchaser, under such entry, is allowed to go behind the act of setting the property apart for the support of schools, in order to question the legality of the act, he must show it to be entirely without authority of law, in order to have benefit from such impeachment of the title.

4. That the designation in this case is not void by reason of any defect apparent on its own face.

5. That the first section of the act of 1812 contemplates a continuous out-boundary of the towns, to be so run as certainly to include the out-lots, common field lots and commons of the towns.

6. That the fact that the survey of such out-boundary includes too much or too little land, does not invalidate the survey, as to any property, which is rightly included within it, and there is no evidence in this case impeaching the correctness of the survey, in including the premises in controversy.

7. That the fact that the survey in the present case professes to be a survey of the incorporated town, with the out-lots, common field lots and commons, does not invalidate it.

8. That the act of 1812 was designed to dispose of all the property included within the out-boundary of the towns.

9. That it was not necessary, in order that the property included within the out-boundary should be reserved for the support of schools, that it should have been surveyed into town lots, out-lots or common field lots under the Spanish government.

10. That the property described in the survey and designation in this case, might properly have been set apart as an out-lot, according to the practice of the government, as shown in evidence on the trial.

Although the instructions asked by the defendant are not commented upon, it is believed they are covered by the principles thus stated.

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From these positions it follows, that the defendant has failed to impeach, successfully, the title of the plaintiffs. On some of these points, there has been hesitation in giving an opinion that differs so far from those expressed by other Judges of this court on former occasions, and it is hoped that, as this case depends entirely upon the construction of laws of the United States, it will be taken to the tribunal in which such questions may be finally settled.

The judgment is, with the concurrence of Judge Ryland, affirmed.

SCOTT, Judge, dissents, and refers to his opinion in the case of *Eberle v. St. Louis Public Schools*, 11 Mo. Rep. 257.



RICHARDS & ROBINSON, Plaintiffs in Error, *vs.* LEVIN, Defendant in Error.

1. Where a debtor, in failing circumstances, assigns all his property for the benefit of certain preferred creditors, a clause in the deed of assignment, directing the surplus, if any, after paying the enumerated debts, to be paid to the grantor, will not make the deed fraudulent as to the other creditors, where it is admitted that the whole property is insufficient to pay even the preferred debts.

*Error to Marion Circuit Court.*

Richards & Robinson sued Levin by attachment, alleging in the affidavit, that Levin had made and was about to make a fraudulent disposition of his property, so as to hinder, delay and defraud his creditors. Issue was taken by defendant on the affidavit, which was tried before the court sitting as a jury. The plaintiffs read in evidence a deed of assignment made by Levin to trustees for the benefit of certain creditors, two or three days before the commencement of this suit. The deed of assignment contained a clause requiring the trustees, after paying the creditors named in the deed, to pay the *surplus* money, if any should be left from the sale of the assigned property, to Levin, the maker of the deed of assignment.

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This deed of assignment and the evidence contained in the following written agreement of counsel was all the testimony in the case. The written agreement was as follows: "Plaintiffs, on their part, agree in this cause, that the deed of assignment, dated February 25th, 1850, and signed by H. Levin, Wm. M. Cooke, and R. F. Lakenan, and proof that Levin at the date of that deed was in failing circumstances, and that the property named in said deed was all the property then owned by Levin, and that Levin had, at the time of said assignment, other creditors to a large amount, besides those named in said deed of assignment, is all the evidence they have to support the affidavit herein. It is admitted by the plaintiffs, that the debts set forth in the assignment above, were just and valid debts, owed at the time by Levin. Defendant admits that all the facts set forth above, and relied on by plaintiffs, as evidence, are true. Plaintiffs admit that the amount of the debts in the deed of assignment exceeds the value of the property named therein."

The plaintiffs asked the court to instruct that this testimony was evidence of fraud in fact and in law against Levin, sufficient to sustain a verdict against him in the premises; which instruction the court refused, and gave other and opposite instructions, to which plaintiffs excepted.

*Richmond, Harrison & Hawkins*, for plaintiffs in error.

1. The deed of assignment was in part a conveyance in trust for the use of the grantor, and therefore void by the first section of the act concerning fraudulent conveyances. *R. C. 1845.* 2. This is an attempt at an illegal transfer of property by a debtor in failing circumstances, for the benefit of a part only of his creditors in the first place, and secondly, for *his own use*. It is, therefore, fraudulent and void. *Goodrich v. Downs*, 6 Hill, 438. *Mackie v. Cairns*, 5 Cow. 584. *Strong v. Skinner*, 4 Barb. S. C. Rep. 546. *Dana, Adm'r, v. Lull*, 17 Vt. Rep. 390. *Harris v. Sumner*, 2 Pick. 129. *Burd v. Fitzsimons*, 4 Dallas, 77. *Passmore v. Eldridge*, 12 Serg. & Rawle, 198. 3. This is

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such a fraudulent conveyance or assignment as is contemplated by the attachment act. R. C. 1845.

*A. W. Lamb*, for defendant in error. 1. In order to sustain the charge in the affidavit, plaintiffs were bound to prove a fraud *in fact*. It is the fraudulent *intent* with which a conveyance is made that warrants the issuing of an attachment; not the *effect* such conveyance may have upon creditors. But in this case, delay or hindrance was neither intended or effected. 2. The question, whether the deed made by Levin be void or not, in consequence of the reservation clause, cannot be considered in this case. It may be *void*, but that does not prove that it was *fraudulent*.

*Glover & Campbell*, for same. The deed of assignment was not fraudulent. 1. No schedule was necessary. 5 Mass. Rep. 42. 2. The reservation of the surplus, if any, could not vitiate it. 1 Ala. Rep. 249. 5 Pick. 32. 15 J. R. 589. 20 ib. 548. The cases in 11 Wend. 187, 2 Pick. 129, 10 Yerg. 146, and 5 Cow. 548, are not in point. They involved actual appropriations in the deed of assignment, for the benefit of the assignor, for his own use and consumption. Here, there is no attempt to appropriate the surplus to the consumption of the debtor. Payment to him may very well be effected by a payment to his creditors, as the surplus may be considered as not disposed of by the deed, and remaining, like a note given him for property *bona fide* sold, subject to seizure by creditors. See 7 Pet. 608.

GAMBLE, Judge, delivered the opinion of the court.

1. In this case it is admitted that the assignment made by Levin, when in failing circumstances, was intended to secure *bona fide* creditors named in the assignment; and that the property conveyed by the assignment, although all the property he possessed, was insufficient to satisfy the debts mentioned in the deed as the debts of the preferred creditors. It is admitted that he was, at the time of making the deed, indebted to other persons besides the creditors he preferred; and that the assignment contained a clause, under which, any sur-



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plus, after paying the preferred debts, was to be paid to him. That a debtor in failing circumstances may lawfully prefer one or more of his creditors, and pay the debts due to them in full, while other creditors are left unpaid, does not now require the citation of authorities to establish. That the clause in an assignment directing the surplus, after paying the enumerated debts, to be paid to the grantor, is nothing more than a declaration of the effect which the law would give to the conveyance, is a perfectly plain truth; and in this case, where the parties have agreed that the whole amount assigned is insufficient to pay the preferred debts, the idea that the reservation of a surplus to the grantor will render the deed fraudulent, is a mere mistake.

The court below treated the case rightly, in the instructions given, and the judgment is affirmed.

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HARRIS, Respondent, *vs.* HUGHES, Appellant.

1. A Circuit Court has no right to dismiss an appeal from a justice, on account of the smallness of the amount in controversy.

*Appeal from Washington Circuit Court.*

*Thomas C. Johnson*, for appellant. The Circuit Court had no right to dismiss the appeal from the justice, on account of the smallness of the amount sued for.

RYLAND, Judge, delivered the opinion of the court.

The plaintiff, Harris, sued Hughes before a justice of the peace, for a hog of the value of \$6 80. Upon the trial before the justice, the plaintiff recovered against the defendant the above amount. The defendant thereupon appealed to the Circuit Court. The appeal was taken in accordance with the statute, and regularly called for trial. When the plaintiff, in the Circuit Court, stated his case in his opening before the jury, the court, of its own mere motion, dismissed the appeal — giving for reason, that the amount was too small to

engage the attention of the court or to take up its time, and rendered judgment against the appellant and his security for costs. The appellant objected to the ruling of the court, tendered his bill of exceptions, and brings the case here by appeal.

1. Was the court below authorized, under the law, in giving the judgment? We think not. The first section of article 8 of the act concerning Justices' Courts, R. C. of 1845, page 667, declares that, "any person aggrieved by *any judgment* rendered by a justice of the peace, except a judgment by confession, may, in person or by his agent, make his appeal therefrom to the Circuit Court of the same county where the judgment was rendered."

There is no minimum prescribed by our statute, under which a judgment before a justice of the peace cannot be taken by appeal to the Circuit Court—no restraint upon the right of appeal by reason of the *amount* of the judgment, in case the justice had jurisdiction. No matter, therefore, how much the courts of the state may disapprove litigation for small and trifling sums, nor how earnestly they may desire to repress a litigious spirit among our citizens, still the law must be looked to, as affording the only means to put in practice such views. There is nothing in our laws prohibiting the appeal in this case. The court below erred in dismissing the appeal, and giving judgment for costs against the appellant and his security. His judgment, therefore, with the concurrence of the other judges, is reversed, and the cause remanded for further proceedings.

[REMAINDER OF OCTOBER TERM IN NEXT VOLUME.]

# INDEX.

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## ACCOUNT.

1. When an account between parties is stated, with debit and credit sides, and the very matter about which the controversy arises is stated in the account, the presumption of law is, that the account is just, unless it be shown that there is some fraud, omission or mistake. *Carroll v. Paul*, 226.
2. One tenant in common may sue another under the new code, without resorting to the action of account under the statute of 1845. *Rogers v. Penniston*, 432.

## ACTION ON THE CASE.

1. A. sets fire to the stubble on his inclosure, and, without any negligence or default on his part, and by inevitable accident, it escapes and crosses over the open prairie to the inclosure of B. and burns his fence. *Held*, A. is not liable to an action for the damage.
2. *Query*, If the stubble is fired on Sunday? *Miller v. Martin*, 508.

## ADMINISTRATION.

See JUDGMENTS, 2.

1. The third and fifteenth sections of the act concerning executors and administrators, approved February 21, 1825, have no retrospective operation and do not have the effect to revoke the letters of an administratrix who had married before the passage of the act. *Frye v. Kimball*, 9.
2. In an action by a child against the administrator of his deceased mother, for money received by her in the capacity of guardian, the administrator will not be allowed to set up a claim for the support and education of the child by the intestate, when there is no evidence that she ever intended to make a charge therefor. *Guion v. Guion's Administrator*, 48.
3. Executions against the estates of deceased persons, were legal in this state, until the passage of the act approved December 30, 1826, which took effect from May 1, 1827. *Carson v. Walker*, 68.
4. Under the act of January 25, 1817, section 5, taken in connection with the act of January 12, 1822, section 28, where an execution against the estate of a deceased person was issued in less than eighteen months after the date of the letters testamentary, but the sale of the lands under it did not take place until more than eighteen months had elapsed, the sale is valid. *Ibid*.
5. Under the statute of this state up to 1826, land, which the testator had devised in trust for an infant child, might be levied on and sold under an execution against the estate of the testator. *Ibid*.
6. An administrator cannot impeach the conveyance of his intestate for fraud as to creditors. *McLaughlin v. McLaughlin*, 242.
7. After an administrator, upon a settlement, has been adjudged to pay over a sum of money, he is subject to garnishment in a suit against the person in whose favor payment has been adjudged. *Richards v. Griggs*, 416.
8. Under sections 9, 10 and 11 of article 2 of the act concerning administration, (R. S. 1845,) a creditor of an estate cannot maintain an action in the county court against

## ADMINISTRATION—(Continued.)

the administrator for concealing or embezzling property of the estate. *Powers v. Blakey's Administrators*, 437.

9. Although the county court has exclusive original jurisdiction of controversies respecting the duties of administrators, yet that jurisdiction can only be exercised in the manner prescribed by statute. *Ibid.*
10. To give the county court jurisdiction of a proceeding by a creditor against an administrator, for waste, under sections 1, 2, 3 and 4 of article 7 of the act concerning administration, (R. S. 1845,) it must appear that there is an insufficiency of assets returned by the administrator to pay all demands allowed against the estate. *Ibid.*
11. In a proceeding before a county court by an administrator, to obtain an order for the sale of real estate claimed as belonging to the estate of his intestate, a party cannot interfere and resist the order of sale, on the ground that he has a superior title. Such a person is not "interested in the estate," within the meaning of the 24th section of article 3 of the act concerning administration, (R. S. 1845.) *Shields v. Ashley's Administrator*, 471:
12. County courts have no jurisdiction to try titles to land. *Ibid.*

See ASSUMPSIT, 1.

## AGREEMENTS.

See CONTRACTS.

## AMENDMENT.

See PLEADING, 2. SUPREME COURT, 2.

## APPEAL.

1. An appeal does not lie from the St. Louis law commissioner's court to the circuit court, but only to the supreme court. *Little v. Sellick*, 269.
2. The St. Louis law commissioner cannot affirm the judgment of a justice of the peace, for the non-payment of the fee given him by the act of February 17, 1851, upon the filing of the appeal papers. *Hunt v. Hernandez*, 170.
3. A circuit court has no right to dismiss an appeal from a justice, on account of the smallness of the amount in controversy. *Harris v. Hughes*, 599.

## ASSAULTS.

See CRIMES AND PUNISHMENTS, 1.

## ASSIGNMENT.

See ASSUMPSIT.

1. The assignee of a lease by way of mortgage is not liable to the lessor for rent, unless he enters into possession. *McKee v. Angelrodt*, 283.
2. To constitute a valid assignment of a debt not evidenced by bond, bill or note, as against the debtor, notice must be given to him; and if, after an assignment without notice to him, judgment is obtained against him, as garnishee, in a suit against his original creditor, he will be protected. *Richards v. Griggs*, 416.
3. Where a debtor, in failing circumstances, assigns all his property for the benefit of certain preferred creditors, a clause in the deed of assignment, directing the surplus, if any, after paying the enumerated debts, to be paid the grantor, will not make the deed fraudulent as to the other creditors, where it is admitted that the whole property is insufficient to pay even the preferred debts. *Richards & Robinson v. Levin*, 596.

## ASSUMPSIT.

See PLEADING, 3.

ASSUMPSIT—(Continued.)

1. A. assigns to B. money due him from the United States as pay for services in the war of the revolution. A. dies, and C., his administrator, receives the money from the government. *Held*, B. cannot maintain an action against C. for the money without having first made a demand. *Evans v. King*, 525.

ATTACHMENT.

See INTERPLEADER. BONDS AND NOTES.

AUTHENTICATION.

See RECORDS, 1.

BAILMENT.

See COMMON CARRIERS.

1. The delivery of a slave, on a bailment by way of loan, does not subject the property to the debts of the bailee, until possession shall have continued five years under the loan. *McDermott v. Barnum & Moreland*, 114.

BILLS OF INTERPLEADER.

See *Richards v. Griggs*, 416.

BOATS AND VESSELS.

1. Under the 35th section of the act concerning boats and vessels, (R. S. 1845,) one of several part owners of a boat may sue in the name of the boat. *Steamboat Beardstown v. Goodrich & Osborne*, 153.
2. See COMMON CARRIERS.
3. On an open running account against a boat, the lien continues for six months from the date of the last item. *Carson & Brookes v. Steamboat Dan. Hillman*, 256.
4. Under the fourth subdivision of the first section of the act concerning boats and vessels, (R. S. 1845,) an action cannot be maintained against a boat, for damages sustained by a hand, in being forced ashore by the master, in breach of a contract of hiring. *Blass v. Steamboat Robert Campbell*, 266.
5. See JUDGMENTS, 2.

BONDS AND NOTES.

- A., commencing an attachment suit against B., in the United States circuit court, executed a bond to B., conditioned to pay all damages that might accrue to B. or to any garnishee, by reason of a failure to prosecute the suit, with effect and without delay. *Held*,
1. In case of a breach of the bond, B. may maintain a suit thereon to the use of any garnishee who has been damaged.
2. Such a bond, although voluntary and not authorized by any statute, is good as a common law bond.
3. A bond with the same condition, made to the United States, instead of B., is valid, although not executed in pursuance of any law, nor in connection with any business of the United States, nor any duty of the obligor to them. A garnishee may sue on such a bond, in the name of the United States, to his use. *Barnes v. Webster*, 258.

See GARNISHMENT, 5. JUDGMENTS, 2. MORTGAGE, 6.

BOUNDARIES.

1. A deed, which refers for a description of the land conveyed, to a plat which shows a river to be one of the boundaries, is to be construed as if such a call was expressed in the body of the instrument. *Shelton & Heatherly v. Maupin*, 124.
2. When a deed, made either by the government or an individual, calls for a river as a boundary, the tract must have that boundary, although it does not correspond with the established corners and monuments. *Ibid*.

## BOUNDARIES—(Continued.)

3. Where the owners of contiguous lots mutually establish a boundary line, and build up to it, and use and occupy according to it, for a period long enough to show their acquiescence, although less than the period which would be a bar under the statute of limitations, they and those claiming under them will be estopped from afterwards claiming a different boundary. *Blair v. Smith*, 273.

## CHANCERY.

1. The St. Louis court of common pleas, under the new code, has chancery jurisdiction. *McLaughlin v. McLaughlin*, 242.
2. See PLEADING, 6. PRACTICE, 6, 7, 8, 17. SUPREME COURT.
3. A mistake in the calculation of interest will be relieved against by a court of equity. *Boon v. Miller's Executors*, 457.

## CIVIL LAW.

See *Childress & Mullanphy v. Cutter*, 24.

## CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. In a proceeding under the new code, to recover personal property, the value of the property need not be stated in the petition, if it is stated in the affidavit; nor is the omission of the jury to find the value a fatal error. *Schaffer v. Faldwesch*, 337.

## COMMON CARRIERS.

1. Although a steamboat may be liable as a common carrier, for packages of money, yet there can be no such liability, if the service was to have been performed without hire. *Chouteau & Valle v. Steamboat St. Anthony*, 216.
2. The act of a captain of a boat, in taking money for transportation, is not *prima facie* evidence of the liability of the boat. *Ibid.*
3. To make the boat, or its owners liable, in such a case, it must be shown that it was within the scope of the usual employment and services of the boat, for the captain to carry packages of money for hire on account of the owners. If the captain carries them on his own account and responsibility, the owners are not liable. *Ibid.*
4. The law which controls the liability of common carriers does not begin to apply until the actual bailment is made. The act of God will not excuse a man for failure to comply with an absolute contract to receive and transport goods at a future time, merely because he is a common carrier. *Collier v. Swinney*, 484.

## COMMUNITY.

1. By the custom of Paris, real estate owned by either party, at the time of marriage, did not enter into the community. *Childress & Mullanphy v. Cutter*, 24.
2. A marriage contract, purporting to create a community according to the custom of Paris, contained this clause: "The said future spouses take each other, with their property and all the rights now actually belonging to them, and also those which may fall to or appertain to them, &c., which property shall wholly enter into the community, &c." Held, the words "which property," must be understood as applicable only to that which came to them during marriage. *Ibid.*

## COMPROMISE.

See ESTOPPEL, 7.

## CONFIRMATIONS.

See LANDS AND LAND TITLES.

## CONSIDERATION.

See CONTRACTS, 4.



## CONSTITUTION.

1. The third and fifteenth sections of the act concerning executors and administrators, approved February 21, 1825, have no retrospective operation. *Frye v. Kimball*, 9.
2. The legislature has power to change the terms of courts and the return days of suits and process. *Carson v. Walker*, 68.
3. The act concerning "towns," (R. S. 1845,) is constitutional. The duties imposed on the county court are judicial and not legislative in their nature. *Kayser v. Bremen*, 88.

## CONTRACTS.

- A. conveyed to B. real estate to be held in trust for A. until a certain sum was paid, and afterwards in trust for the separate use of the wife of C. At the same time, A. executed an agreement to complete improvements then in progress on the property, in a specified time and manner. *Held*,
1. Although C.'s wife assumed no personal obligation to pay the stipulated price, yet payment could be enforced against the property itself. *Soulard v. Lane*, 366.
2. She is entitled to a deduction from this sum, to the extent of any loss sustained by a failure of A. to comply with his contract to complete the improvements. *Ibid*.
3. The rule which would prevent A. from recovering any part of the price, unless he had strictly complied with his contract, is only applicable where a defendant is resisting a personal judgment, because of a failure of plaintiff to have work done according to a contract. *Ibid*.
4. A. sold B. certain slaves, warranting his title to be good. *Held*, as long as B. remains in undisturbed possession of the slaves, he cannot set up, as a defence to a note given for the purchase money, that, at the time of the sale, the title was not in A. In such a case, there is no failure of consideration, within the meaning of the fourteenth section of article five of the act concerning "justices' courts," (R. S. 1845.) *Morrison v. Edgar*, 411.
5. A. and B. own a ferry in common, with an agreement that each shall be entitled to one half of the proceeds, after paying all expenses. B., in good faith and for a valuable consideration, leases the ferry out to C. without the consent of A. *Held*, A. cannot recover of B. one-half of the proceeds received by C., but only one-half of the rent reserved by B. *Rogers v. Penniston*, 432.
6. See *Pitcher v. Hovey*, 436.
7. Where A. contracts to do work under the control and direction of B., he is not responsible for want of skill, unless he fails to comply with B.'s directions. *Denny v. Kile*, 450.
8. A party can maintain no action on a contract which he procures by fraud. *Ibid*.
9. By the terms of a contract sued on, the defendants were to deliver plaintiff broom corn, cleaned and baled, ready for shipping, as fast as the same could be prepared by them; the plaintiff was to have the control and direction of the whole work. *Held*, evidence of defects in machinery furnished by plaintiff to defendants, which occasioned delay, is competent evidence for defendants, in an action for a breach of the contract. *Ibid*.
10. A plaintiff cannot recover for the breach of a stipulation in a contract, unless he has performed all the acts on his part, which were conditions precedent, and is ready to perform those which were to be performed concurrently with the act of the defendant. *Ibid*.
11. The facts appearing in evidence, the understanding of a witness can have no influence in determining whether one or two persons are bound by a contract. *Elliott v. Sanderson*, 482.

## CONTRACTS—(Continued.)

12. The act of God will not excuse a man for failure to comply with an absolute contract to receive and transport goods at a future time, merely because he is a common carrier. *Collier v. Swinney*, 484.

## CONTRIBUTION.

1. A., owning several tracts of land subject to the lien of judgments in the county, executes a bond to convey one of them to B., by deed of general warranty. Before B. records his title, an execution from another county is placed in the hands of the sheriff, which is levied on the other tracts owned by A., and they are sold, and C. becomes the purchaser. Afterwards, and before B. pays the purchase money, executions upon the judgments first named are levied on the tract sold to B., and it is sold, B. buying it in. *Held*, B. cannot maintain an action against C. for contribution. If C. is liable to any one in such an action, it is to A. *Ingram & Hathaway v. Tompkins*, 399.

## CONVEYANCES.

1. Although a survey of the United States within a confirmed claim is of no force against the claimant, yet, when he adopts the survey, as designating any portion of his land, it may furnish a valid description, by which he may convey such portion. *Shelton & Heatherly v. Maupin*, 124.
2. A deed which refers for a description of the land conveyed, to a plat which shows a river to be one of the boundaries, is to be construed as if such a call was expressed in words in the body of the instrument. *Ibid*.
3. When a deed, made either by the government or an individual, calls for a river as a boundary, the tract must have that boundary, although it does not correspond with the established corners and monuments. *Ibid*.

## CORPORATIONS.

1. Under the act concerning "towns," (R. S. 1845,) when the county court, under a state of facts which give it jurisdiction over the subject matter, has declared a town incorporated, the validity of its charter can only be contested by a proceeding in *quo warranto*. *Kayser v. Bremen*, 88.
2. That act is not unconstitutional. The duties imposed on the county court are judicial and not legislative in their nature. *Ibid*.
3. Under the law of 1851, authorizing the formation of companies to construct plank roads, a stockholder, who assists in the organization of the company, will not be permitted to escape from his liability to pay for his stock, upon the ground that the company was not organized in strict conformity to the law. *Central Plank Road Co. v. Clemens*, 359.
4. Nor on the ground that no legal notice was given of the election of directors. *Ibid*.
5. It is no defence to a suit for an instalment upon stock in a plank road company, that there has been a departure from the route proposed in the articles of association. *Ibid*.

## COSTS.

1. When a person, who has entered into a recognizance to keep the peace and to appear before the criminal court, shall there be discharged, by reason of the failure of the prosecutor to appear, it is error for the court to adjudge the costs against the defendant. They should be adjudged against the prosecutor. *State v. Fawcett*, 380.

## COUNTY.

1. Under the act of 1851, concerning the St. Louis law commissioner's court, the county is not required to furnish a room for the transaction of the business of that court. *Watson v. St. Louis County*, 91.

COUNTY COURTS.

See ADMINISTRATION.

1. County courts have no jurisdiction to try titles to land. *Shields v. Ashley's Administrator*, 471.

COURTS.

1. The legislature has power to change the terms of courts and the return day of suits and process. *Carson v. Walker*, 68.

CRIMES AND PUNISHMENTS.

See INDICTMENTS.

1. On a charge of assault with intent to kill, an instruction, which so defines the crime as to exclude all consideration whether the assault was committed under circumstances of provocation, or in self defence, is erroneous. *State v. Williamson*, 394.

CUSTOM.

1. By the custom of Paris or French law, real estate owned by either party at the time of marriage, did not enter into the community. *Childress & Mullanphy v. Cutter*, 24.
2. A marriage contract, purporting to create a community according to the custom of Paris, must be construed with reference to that custom. *Ibid.*

DAMAGES.

1. Where a sale of leasehold under a deed of trust was enjoined, and pending the injunction, the buildings burned down and the lease was declared forfeited, so that the trust property would not have sold for enough to defray the expenses of a sale; it was held that, upon the dissolution of the injunction, the damages were properly assessed at the whole amount of the notes with interest, even though the makers were solvent. *Kennedy v. Hammond & Hall*, 341.
2. A. brought an action of trespass against B. for the value of a negro woman slave taken and converted by B. to his own use, and recovered a judgment, which was satisfied. During the pendency of the suit, the slave was delivered of a child. A. afterwards brings another suit for the value of the child. Held, A. cannot recover, as the interest which accrued during the pendency of the first suit, by the birth of the child, was merely an incident to the principal object of the suit, and might have been taken into consideration by the jury in assessing the damages in that suit. *Garth v. Everett*, 490.
3. A set-off is not admissible where the claim on either side is for unliquidated damages. *Johnson v. Jones*, 494.
4. A. sets fire to the stubble on his inclosure, and, without any negligence or default on his part, and by inevitable accident, it escapes and crosses over the open prairie to the inclosure of B. and burns his fence. Held, A. is not liable to an action for the damage.

Query, If the stubble is fired on Sunday? *Miller v. Martin*, 508.

DEEDS.

See CONVEYANCES.

DEMAND.

See ASSUMPSIT, 1.

DEPOSITIONS.

1. The deposition of a witness has been taken in a suit and remains on file unsuppressed. Held, on the trial of the suit, the party cannot read in evidence a deposition of the same witness, taken in a former suit between the same parties, unless he has filed it in the suit in which he proposes to read it, or has given the opposite party notice that he intends to use it. *Samuel v. Withers*, 532.

## DESCENTS AND DISTRIBUTIONS.

1. By the Spanish law, which formerly prevailed in this state, if a husband or wife married a second time, the property which he or she acquired from a former spouse, either directly or by inheritance from any of the children of the first marriage, became the property of the surviving children of the first marriage, and the spouse who married again only had the usufruct of it during life. *Childress & Mullanphy v. Cutter*, 24.
2. There was an exception to this general rule, in favor of women becoming widows before the age of twenty-five years. But a widow, who claims the benefit of this exception, must prove herself within it; otherwise, the case will be determined according to the general rule. *Ibid.*
3. Under the twelfth section of the territorial act of July 4th, 1807, upon the death of a person who had acquired an estate of one of his parents, the estate descended exclusively to his blood, on the part of the parent from whom it came to him. *Ibid.*

## DETINUE.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

## DEVISE.

1. Under the statutes of this state, up to 1826, land which the testator had devised in trust for an infant child might be levied on and sold, under an execution against the estate of the testator. *Carson v. Walker*, 68.

## DOWER.

1. Under our statute, a widow is entitled to dower in no other personalty than that which belonged to the husband at the time of his death. *McLaughlin v. McLaughlin*, 242.
2. Under the act of congress of March 3d, 1843, a widow is not entitled to dower in land to which her husband had a mere right of pre-emption, which had not been consummated at the time of his death. *Wells' Guardian v. Moore*, 478.

## EJECTMENT.

1. The plaintiff in an ejectment offered in evidence, in support of his title, a transcript filed in the circuit court of a judgment rendered before a justice of the peace. He then offered an execution issued from the circuit court, which, on its face, purported to be on a judgment of the circuit court, and a sheriff's deed, under this execution, and reciting it. Held, the execution and sheriff's deed were properly excluded. *Blain v. Coppedge*, 495.

## EQUITY.

See CHANCERY.

## ESTOPPEL.

1. A party is not estopped from claiming as his own personal property which he has "delivered to another and permitted him to retain possession of and use and control as his own." To amount to an estoppel, there must be something more specific. *McDermott v. Barnum & Moreland*, 114.
2. The acceptance of a deed is not such a recognition of the title of the vendor, as to estop the vendee from availing himself of a possession adverse to that title, under the statute of limitations. *Blair v. Smith*, 273.
3. Where the owners of contiguous lots mutually establish a boundary line and build up to it, and use and occupy according to it, for a period long enough to show their agreement and acquiescence, although less than the period which would be a bar under the statute of limitations, they, and those claiming under them, will be estopped from afterwards claiming a different boundary. *Taylor & Mason v. Zepp*, 14 Mo. Rep., affirmed. *Ibid.*

## ESTOPPEL—(Continued.)

4. This principle is not in contravention of the statute of frauds. *Ibid.*
5. A. brought an action against B., to recover the proceeds of land sold as A.'s, on execution in favor of B., under a judgment, which, as A. claimed, B. had previously agreed to enter satisfied. *Held*, A. cannot maintain such an action, when he disclaims any title to the land sold, and admits on the trial that he has none. *Barada v. Carondelet*, 323.
6. A stockholder in a plank road company who assists in the organization will not be permitted to escape from his liability to pay for his stock, on the ground that the company was not organized in strict conformity to the law. *Central Plank Road Co. v. Clemens*, 359.
7. A., claiming an equitable title to land, files a bill in chancery against B., who holds the legal title. *Held*, B. may set up in defence a prior equity in C., and is not estopped from so doing, by a written agreement of compromise between him and C., in which it is recited that "B. is satisfied he has an indefeasible title to the land and C. acknowledges he has no just claim to it." *Livermore v. Leonard*, 474.

## EVIDENCE.

1. A certified copy of any record or public paper, by the officer intrusted with its custody, is evidence, if the original would be; but such documents are not evidence of matters stated in them, which do not belong to the transaction which the officer was required to record. *Childress & Mullanphy v. Cutter*, 24.
2. Church registers are not admissible in evidence, except by special statute, unless they are, by the civil law of the country or state where kept, recognized as documents of an authentic and public nature. *Ibid.*
3. Recitals in such registers are not admissible as evidence of pedigree. *Ibid.*
4. Under the act of congress of May 26, 1790, in a suit upon a judgment of another state, whose laws, as to the effect of judgments, correspond with our own, when it appears from the face of the record that the defendant appeared by his attorney, evidence to show that the attorney had no authority to appear is not admissible. *Warren & Dalton v. Lusk*, 102.
5. In a suit by A. against B., for the price of a cow sold by B. to A., the record in a suit between A. and C. who claimed to own the cow, in which there was a judgment in C.'s favor, is not competent evidence to show title in C., nor for any other purpose, unless B. had notice of the suit. *Fallon v. Murray*, 168.
6. The person of whom B. bought the cow, is a competent witness for him, in such a suit. *Ibid.*
7. See PLEADING, 4, 5.
8. A trustee is a competent witness for the *cestui que trust*, in respect to the trust property. If, however, he were incompetent, the dismissal of the suit as to him, after his testimony had been taken, would not restore his competency. *McLaughlin v. McLaughlin*, 242.
9. The admissions of the grantor in a deed of trust after its execution, although not admissible against the *cestui que trust*, are in his favor. *Ibid.*
10. An administrator, in a suit against him, may show that funds have come into the hands of the plaintiff, as administrator of the deceased in another state, in reduction of the amount sought to be recovered. *Ibid.*
11. The plaintiff, in his declaration, averred that he had deposited a certain sum of money with B., as a banker, and that the defendant, C., in consideration that B. would take him as a partner, had promised to pay the sum so deposited. The evidence was, that the plaintiff had deposited the money with B. and D., as partners, and that D. went out, and shortly after C. came into the firm. *Held*, this was no material variance. *Hoyt v. Reed*, 294.

## EVIDENCE—(Continued.)

12. In such a case, when the plaintiff produced his bank book, which showed his account, commencing before the defendant came in as a partner, and running down after he came in, with balances struck after that time; and when it was shown that this account was but a transcript of the ledger of the concern, the court could not, with propriety, say there was no evidence, that the defendant had assented to the transfer of the liabilities of the old to the new firm. *Ibid.*
13. A party who has been jointly indicted with the defendant, but in whose case a *nolle prosequi* has been entered, is a competent witness against him. *State v. Clump*, 385.
14. The supreme court will not reverse either a criminal or civil case, for the refusal of the court below to instruct the jury that evidence of verbal confessions is to be received with great caution. *Ibid.*
15. A. was indicted for an assault upon B. with intent to kill. A. had previously written an obscene letter about his own wife, the mother-in-law of B., out of which the affray originated, in which A. was first attacked. *Held*, this letter was inadmissible as evidence against A. *State v. Williamson*, 394.
16. A widow is a competent witness for the interest of her deceased husband's estate. *Scroggin & Smith v. Holland*, 419.
17. To authenticate a record of a court of another state, under the act of congress of May 26, 1790, the certificate of the judge must state that the attestation of the clerk is in due form. *Wilburn's Administrator v. Hall*, 428.
18. In an action against a person for failing to attend as a witness, when duly summoned, a transcript of the subpoena served on him and of the record of a part of the proceedings in the case, is admissible evidence, although the full record is not offered. *Connett v. Hamilton*, 442.
19. By the terms of a contract sued on, the defendants were to deliver plaintiff broom corn, cleaned and baled, ready for shipping, as fast as the same could be prepared by them; the plaintiff was to have the control and direction of the whole work. *Held*, evidence of defects in machinery furnished by plaintiff to defendants, which occasioned delay, is competent evidence for defendants, in an action for a breach of the contract. *Denny v. Kile*, 450.
20. The facts appearing in evidence, the understanding of a witness can have no influence in determining whether one or two persons are bound by a contract. *Elliott v. Sanderson*, 482.
21. The plaintiff in an ejectment offered in evidence, in support of his title, a transcript filed in the circuit court of a judgment rendered before a justice of the peace. He then offered an execution issued from the circuit court, which, on its face, purported to be on a judgment of the circuit court, and a sheriff's deed, under this execution, and reciting it. *Held*, the execution and sheriff's deed were properly excluded. *Blain v. Coppedge*, 495.
22. If there is any evidence, however slight, it is error for a court to tell a jury there is none. *Hays v. Bell & Williams*, 496.
23. It is error for a court to give instructions to a jury, which are supported by no evidence. *Ibid.*
24. When an account between parties is stated, with debit and credit sides, and the very matter about which the controversy arises is stated in the account, the presumption of law is, that the account is just, unless it be shown that there is some fraud, omission or mistake. *Carroll v. Paul*, 226.

## EXECUTIONS.

1. Executions against the estates of deceased persons were legal in this state, until the



## EXECUTIONS—(Continued.)

- passage of the act approved December 30, 1826, which took effect from May 1, 1827. *Carson v. Walker*, 68.
2. Under the act of January 25, 1817, section 5, taken in connection with the act of January 12, 1822, section 28, where an execution against the estate of a deceased person was issued in less than eighteen months after the date of the letters testamentary, but the sale under it did not take place until more than eighteen months had elapsed, the sale is valid. *Ibid.*
  3. An execution, issued within a period forbidden by law, on a judgment lawfully rendered in a court of general jurisdiction, is not void, but only voidable. *Ibid.*
  4. Under the statutes of this state, up to 1826, land which the testator had devised in trust for an infant child, might be levied on and sold, under an execution against the estate of the testator. *Ibid.*
  5. Under the fifth clause of the fourteenth section of the act concerning executions, (R. S. 1845,) where A. has agreed to convey land to B. and B. has agreed to pay for it, or has paid for it in whole or in part, B. has such an interest in the land as may be sold under execution. *Aliter*, If B. has paid no money and is under no obligation to pay. *Brant v. Robertson*, 130.
  6. The interest of a mortgagor, or pledgor, of personal property in the hands of the mortgagee, or pledgee, is not subject to sale under execution. *Sexton v. Monks*, 156.
  7. See SALE, 3.
  8. Equitable interests, in personal estate, are not vendible under execution. *Boyce v. Smith*, 317.
  9. See ESTOPPEL, 5.
  10. A judgment confessed by one partner, in the name of himself and his co-partner, is void as to the co-partner, and an execution issued thereon is properly quashed on his application. *Morgan v. Richardson*, 409.
  11. See EVIDENCE, 21.
  12. See JUSTICES OF THE PEACE, 2.
  13. A party cannot interplead to claim assets in the hands of a person summoned as garnishee on execution. *Wimer v. Pritchett*, 252.

## EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATION.

## FAILURE OF CONSIDERATION.

See CONTRACTS, 4.

## FOREIGN JUDGMENTS AND LAWS.

1. In the absence of the knowledge of what the law of a sister state is, on questions of common law, our courts presume that the law of such state corresponds with our own. *Warren & Dalton v. Lusk*, 102.
2. Under the act of congress of May 26th, 1790, in a suit upon a judgment of another state, whose laws, as to the effect of judgments, correspond with our own, when it appears from the face of the record that the defendant appeared by his attorney, evidence to show that the attorney had no authority to appear, is not admissible. *Ibid.*

## FRAUDS AND PERJURIES.

1. The principle of estoppel *in pais*, as applied to the establishment of boundaries between contiguous land owners, is not in contravention of the statute of frauds. *Blair v. Smith*, 273.
2. Frauds and trusts are not within the statute of frauds. *Groves' Heirs v. Fulsome*, 543.

## FRAUDS AND PERJURIES—(Continued.)

3. A party can maintain no action on a contract which he procures by fraud. *Denny v. Kile*, 450.

## FRAUDULENT CONVEYANCES.

1. The delivery of a slave, on a bailment, by way of a loan, does not subject the property to the debts of the bailee, until possession shall have continued five years under the loan. (R. S. 1845, 527.) *McDermott v. Barnum & Moreland*, 114.
2. A. "delivers personal property to B. and permits him to retain possession of, and use and control it as his own." *Held*, These facts do not amount to fraud in law, but are only evidence of fraud, to be passed upon by a jury. *Ibid*.
3. When, under such circumstances, the property is sold under execution as B.'s, A. is not estopped from claiming it as his own. *Ibid*.
4. A sheriff's sale under execution may be shown to be conclusive or fraudulent, and that there was a secret reservation of a trust in favor of the defendant, with the consent of the purchaser. *Dallam v. Bowman*, 225.
5. A conveyance of an intestate cannot be impeached by his administrator or heirs, for fraud as to creditors. None but creditors themselves, and those in privity with them, can avoid it. *McLaughlin v. McLaughlin*, 242.
6. None but a creditor or purchaser can raise the objection that a deed conveying articles consumable in the using, the grantor retaining possession, is void. *Ibid*.
7. Where a debtor, in failing circumstances, assigns all his property for the benefit of certain preferred creditors, a clause in the deed of assignment, directing the surplus, if any, after paying the enumerated debts, to be paid the grantor, will not make the deed fraudulent as to the other creditors, where it is admitted that the whole property is insufficient to pay even the preferred debts. *Richards & Robinson v. Levin*, 594.

## GAMING.

See GARNISHMENT, 2.

## GARNISHMENT.

1. A party cannot interplead in a cause to claim assets in the hands of a person summoned as garnishee on execution. The garnishee must answer at his peril. *Wimer v. Pritchett*, 252.
2. Where a stakeholder in a wager is summoned as garnishee of the winning party, and the wager was determined without any demand upon the garnishee by the losing party for the money deposited by him, and he makes no claim, judgment will be given against the garnishee for the whole sum in his hands. *Ibid*.
3. After an administrator, upon a settlement, has been adjudged to pay over a sum of money, he is subject to garnishment in a suit against the person in whose favor payment has been adjudged. *Richards v. Griggs*, 416.
4. To constitute a valid assignment of a debt not evidenced by bond, bill or note, as against the debtor, notice must be given to him; and if, after an assignment without notice to him, judgment is obtained against him, as garnishee, in a suit against his original creditor, he will be protected. *Ibid*.
5. A., the maker of a note payable to B., was summoned as garnishee in an attachment suit against B., before a justice of the peace. C. filed an interplea, claiming the debt evidenced by the note, by endorsement from B., before the date of the garnishment. Judgment went against him on the interplea, from which he took no appeal. Afterwards, he withdraws the note and brings suit on it against the maker. *Held*, the judgment on the interplea is a bar to the action. *Richardson v. Jones*, 177.

## GROCERIES AND DRAM SHOPS.

See INDICTMENTS, 4.

1. Under the act concerning groceries and dram shops, a license to sell intoxicating liquors at one place is no defence to an indictment for selling them at a different place, although the two bars are in adjoining buildings and there is a communication between them. *State v. Fredericks*, 382.
2. Under the amendatory act of 1851, every fermented drink is an intoxicating drink, within the meaning of the act to regulate groceries and dram shops, approved March 25th, 1845. *State v. Lemp*, 389.
3. No person can sell intoxicating liquor without a license, even though it is of domestic manufacture. *Ibid.*

## GUARDIAN AND WARD.

1. In an action by a child against the administrator of his deceased mother, for money received by her in the capacity of guardian, the administrator will not be allowed to set up a claim for the support and education of the child by the intestate, when there is no evidence that she ever intended to make a charge therefor. *Guion v. Guion's Administrator*, 48.

## HUSBAND AND WIFE.

See PRE-EMPTION, 1, 3. DOWER.

1. By the custom of Paris, real estate owned by either party, at the time of marriage, did not enter into the community. *Childress & Mullanphy v. Cutter*, 24.
2. A marriage contract, purporting to create a community according to the custom of Paris, must be understood with reference to that custom. *Ibid.*
3. By the Spanish law, which formerly prevailed in this state, if a husband or wife married a second time, the property which he or she acquired from a former spouse, either directly or by inheritance from any of the children of the first marriage, became the property of the surviving children of the first marriage, and the spouse who married again only had the usufruct of it during life. *Ibid.*
4. There was an exception to this general rule, in favor of women becoming widows before the age of twenty-five years. But a widow who claims the benefit of this exception, must prove herself within it; otherwise the case will be determined according to the general rule. *Ibid.*
5. A. conveyed to B. one half of certain capital stock "in trust for the sole benefit of the wife of C. and her children;" also, one half of the profits arising from the stock, "to be applied by B. for the benefit of C.'s wife and her children." Held, this language is sufficient to exclude C.'s marital right to the profits. *Clark v. Maguire*, 302.
6. No particular form of words is necessary to vest property in a married woman to her separate use, so as to exclude the married rights of her husband. Any words which indicate the intention will be sufficient. *Ibid.*
7. A. conveyed to B. real estate to be held in trust for A. until a certain sum was paid, and afterwards in trust for the separate use of the wife of C. At the same time, A. executed an agreement to complete improvements then in progress on the property, in a specified time and manner. Held, although C.'s wife assumed no personal obligation to pay the stipulated price, yet payment could be enforced against the property itself. *Soulard v. Lane*, 366.
8. A widow is a competent witness for the interest of her deceased husband's estate. *Scroggin & Smith v. Holland*, 419.

## INCLOSURES.

1. To enable a person to justify under the act concerning "Inclosures," (R. S. 1845,) for killing his neighbor's stock, he must bring himself exactly within the protection of the statute. *Early v. Fleming*, 154.

## INDICTMENT.

1. An indictment under section 43 of article 8 of the act of 1845, concerning "Crimes and Punishments," which substantially pursues the words of the statute, is sufficient. Matter of aggravation in a count will not vitiate it. *State v. Fleetwood*, 448.
2. A count which charges that the defendant ran a horse upon the highway, &c., "so as to interrupt travelers," instead of "so as to interrupt travelers thereon," is bad. *Ibid.*
3. Under the twenty-fourth section of article 3 of the act concerning "Crimes and Punishments," (R. S. 1845,) a person may be indicted in the same count for burglary and either grand or petit larceny. *State v. Smith*, 550.
4. A person was indicted for a violation of the first section of the act of 1845, concerning "Groceries and Dram Shops," in selling liquor without license. The indictment charged that he had sold one pint. The proof was that he had sold a half pint. *Held*, the proof was sufficient to sustain the indictment. *State v. Cooper*, 551.

## INFANCY.

See PARENT AND CHILD.

## INJUNCTIONS.

1. Where a petition prays, among other things, for an injunction, but that branch of the petition is not passed upon by the court below, nor brought in any way to its notice, the supreme court will not interfere, as this would be an exercise of original jurisdiction. *Barada v. Carondelet*, 323.
2. Where a sale of leasehold under a deed of trust was enjoined, and pending the injunction the buildings burned down and the lease was declared forfeited, so that the trust property would not have sold for enough to defray the expenses of a sale; *it was held*, that upon the dissolution of the injunction, the damages were properly assessed at the whole amount of the notes, with interest, even though the makers of the notes were solvent. *Kennedy v. Hammond & Hall*, 341.

## INSURANCE.

1. The risks enumerated in the printed part of an open policy of insurance may be restricted or enlarged by the written endorsement of the particular shipment lost. *Moore & Porter v. Perpetual Insurance Co.*, 98.
2. A memorandum, attached to the endorsement of a shipment of negroes, stated that they were only insured against the dangers incident to navigation, such as blowing up, drowning, &c. *Held*, this will cover a loss of a negro by drowning during the voyage, without any disaster happening to the boat, or any unusual occurrence causing him to fall overboard. *Ibid.*

## INTEREST.

See MISTAKES, 1. MORTGAGES, 6.

## INTERPLEADER (BILLS OF.)

See *Richards v. Griggs*, 416.

## INTERPLEADER (IN ATTACHMENT.)

1. A party cannot interplead, under the provision in the attachment law, to claim assets in the hands of a person summoned as garnishee on execution. *Wimer v. Pritchard*, 252.
2. A judgment against a party interpleading in an attachment suit to claim the debt evidenced by a note, the maker of which has been summoned as garnishee, is a bar to a future action on the note. *Richardson v. Jones*, 177.

INTERPLEADER (IN ATTACHMENT)—*Continued.*

3. When a party has filed one interplea in an attachment suit, and on the trial has taken a non-suit, it is no error for the court to strike out a second interplea filed by him in the same case, without leave of court. *Keiser's Administrator v. Moore & Chapman*, 179.

JOINDER.

1. The new code does not affect the rule against multifariousness. Suits against different persons for different causes of action cannot be joined. *McLaughlin v. McLaughlin*, 242.
2. Under the new code, a proceeding by *mandamus* cannot be joined with other actions. *Barada v. Carondelet*, 323.

JOINT TENANTS AND TENANTS IN COMMON.

1. One tenant in common may sue another under the new code of practice of 1849, without resorting to the action of account under the statute of 1845. *Rogers v. Penniston*, 432.
2. A. and B. own a ferry in common, with an agreement that each shall be entitled to one half of the proceeds, after paying all expenses. B., in good faith and for a valuable consideration, leases the ferry out to C. without the consent of A. *Held*, A. cannot recover of B. one half of the proceeds received by C., but only one half of the rent reserved by B. *Ibid.*

JUDGMENTS.

1. Under the act of congress of May 26, 1790, in a suit upon a judgment of another state, whose laws, as to the effect of judgments, correspond with our own, when it appears from the face of the record that the defendant appeared by his attorney, evidence to show that the attorney had no authority to appear is not admissible. *Warren & Dalton v. Lusk*, 102.
2. A. commenced a suit against a steamboat, under the boat and vessel act. B., the owner of the boat, as principal, and C. and D. as sureties, bonded the boat. Pending the suit, B. died. After judgment against the boat, on motion, a judgment was rendered against B.'s administrator on the bond. The administrator was not made a party to the proceeding, nor did it appear from the record that he had any notice of it. *Held*, the judgment against the administrator is not void, and however erroneous it may have been, no advantage can be taken of the error, except by a direct proceeding to reverse or set it aside. *Childs v. Shannon*, 331.
3. A judgment confessed by one partner, in the name of himself and his co-partner, is void as to the co-partner, and an execution issued thereon is properly quashed on his application. *Morgan v. Richardson*, 409.

See EVIDENCE, 21. INTERPLEADER, 2. JUSTICES OF THE PEACE, 2.

4. A judgment rendered in favor of a plaintiff, who had died before its rendition, is not void. *Coleman v. McAnulty*, 173.
5. Proceedings to set aside an irregular judgment will not affect any one who has acquired a title under it, unless he is made a party. *Ibid.*

JURISDICTION.

See ADMINISTRATION, 8, 9, 10. JUSTICES OF THE PEACE, 2.

1. County courts have no jurisdiction to try titles to land. *Shields v. Ashley's Administrator*, 471.
2. The supreme court has no original jurisdiction. *Knowles v. Mercer*, 455. *Barada v. Carondelet*, 323.

JUSTICES' COURTS.

See CONTRACTS, 4.

## JUSTICES OF THE PEACE.

1. No formality is necessary in the statement of causes of action before justices of the peace. *Early v. Fleming*, 154.
2. A. commenced an action against B. before a justice of the peace, on an open account, amounting to more than ninety dollars. On the trial, B. secretly asked the justice if he had jurisdiction, to which the justice replied that he had, as A. did not claim more than ninety dollars. B. then went into the trial, on which A.'s attorney expressly stated that he did not claim more than ninety dollars, and judgment was rendered for less than that sum. *Held*, the judgment and execution issued thereon are not void. *Best v. Best*, 530.

## LANDLORD AND TENANT.

1. When a person rents a tenement for one year, and after its expiration, remains in possession, the presumption is, that he has rented it for another year, and not that he is a trespasser. *Stoops v. Devlin*, 162.
2. In such a case, a tenant holding under him will not be permitted to dispute his title. *Ibid.*
3. It is no defence to an action for rent under an express covenant, that a rise in the river rendered a part of the leasehold premises untenable. When the defendant files an offset for damages sustained by such a rise, it is properly stricken out, on motion. *Niedelet v. Wales*, 214.
4. The assignee of a lease by way of mortgage is not liable to the lessor for rent, unless he enters into possession. *McKee v. Angelrodt*, 283.

## LANDS AND LAND TITLES.

See COMMUNITY, 1, 2. DESCENTS AND DISTRIBUTIONS, 1, 2, 3. PRE-EMPTION.

1. To establish that a lot was a common field lot within the meaning of the act of 1812, it is not necessary to show that the village authorities under the Spanish government exercised any authority over it or its owner. *Harrison v. Page*, 182.
2. A common field lot was one of a series of lots in the vicinity of the village, occupied and cultivated by the inhabitants of the village in a common field. *Ibid.*
3. That a lot was not embraced within a Spanish survey of the common fields, is slight, if any evidence, that it was not a common field lot. *Ibid.*
4. Where a deed, describing the land conveyed by reference to a Spanish concession, was executed at a time when such concession had been located and confirmed by the United States government, and there is no call in the concession inconsistent with such location, the deed will be held to pass the land on which the concession has thus been located. *Ibid.*
5. Although the state courts cannot interfere with the primary disposition of the soil by the general government, yet, if one obtains from the United States the legal title to a tract of land, and in so doing, is guilty of a fraud towards another, or affects himself with a trust, he shall hold the title thus acquired, for the benefit of those who have been injured by his conduct. *Groves' Heirs v. Fulsome*, 543.
6. During the pendency of a suit under the act of congress of May 26th, 1824, to try the validity of a claim to land, the land claimed was not reserved from entry and sale, unless the claimant had filed a notice of his claim with the recorder of land titles prior to July 1st, 1808. A person obtaining a patent for the land from the United States after the institution of the suit and before a final decree in favor of the claimant, will hold it against a patent issued upon the final decree. *McCabe v. Worthington*, 514.
7. The survey, designation and setting apart, for the support of schools, of a piece of property, described to be within the out-boundary of the town, as directed to be surveyed under the act of June 13th, 1812, taken together with the act of 1831,



## LANDS AND LAND TITLES—(Continued.)

- make a regular, formal title to the property so set apart. *Kissell v. Schools*, 553.
8. An entry of the same land with the register and receiver must yield, in an action of ejectment, to the title under such designation. *Ibid.*
  9. If the purchaser, under such an entry, is allowed to question the legality of the act of setting the property apart for the support of schools, he must show it to be entirely without authority of law, and void, in order to have benefit from such impeachment of title. *Ibid.*
  10. A designation, which describes the land set apart for schools, as "within the bounds of the survey directed to be made by the first section of the act of June 13, 1812," &c., and as "within the limits of the town of St. Louis, as it stood incorporated on the 13th June, 1812," &c., is not invalid on its face, although it does not state that the land thus set apart ever was, in whole or in part, a town lot, out-lot or common field lot, belonging to the town, or that it was set apart as such. *Ibid.*
  11. The fact that the survey of the out-boundary of St. Louis, under the act of 1812, professes to be a survey of the *incorporated* town; with the out-lots, common field lots and commons, does not invalidate it, when it is manifest that the incorporated town, according to its own limits, must be within the out-boundary required to be run. *Ibid.*
  12. The fact that the survey of the out-boundary includes too much or too little land, does not invalidate it, as to any property rightly included within it; and to impeach the survey, it must be shown that the land in dispute was not rightly included. *Ibid.*
  13. The first section of the act of 1812 contemplates a continuous out-boundary of the towns, to be so run as certainly to include the out-lots, common field lots and commons of the towns. *Ibid.*
  14. It was not necessary, in order that property included within the out-boundary should be reserved for the support of schools, that it should have been surveyed into town lots, out-lots or common field lots under the Spanish government. *Ibid.*
  15. The act of 1812 was designed to dispose of all the property included within the out-boundaries of the towns. *Ibid.*
  16. Vacant land contiguous to the town of St. Louis, bounded on all sides except one fronting on the river, by land surveyed into lots, might properly have been set apart as an out-lot, according to the practice of the government, though it had never itself been surveyed as a lot. *Ibid.*

## LAW COMMISSIONER.

1. Under the act of 1851, concerning the St. Louis law commissioner's court, the county is not obliged to furnish a room for the transaction of the business of that court. *Watson v. St. Louis County*, 91.
2. Causes cannot be taken by writ of error or appeal from the law commissioner's court of St. Louis county, to the circuit court, but only to the supreme court. *Little v. Sellick*, 269.
3. The St. Louis law commissioner cannot affirm the judgment of a justice of the peace, for the non-payment of the fee given him by the act of February 17, 1851, upon the filing of the appeal papers. *Hunt v. Hernandez*, 170.

## LEGISLATURE.

1. The legislature has power to change the terms of courts and the return days of suits and process. *Carson v. Walker*, 68.

## LICENSE.

See GROCERIES AND DRAM SHOPS.

## LIENS.

See MORTGAGES, 6.

## LIMITATIONS.

See ESTOPPEL, 3.

1. Adverse possession for twenty years confers upon the possessor an absolute title against all persons not excepted by our statute of limitations. *Blair v. Smith*, 273.
2. The acceptance of a deed is not such a recognition of the title of the vendor, as to estop the vendee from availing himself of a possession adverse to that title, under the statute of limitations. *Ibid.*

## MANDAMUS.

See NEW TRIALS, 3.

1. Under the new code of 1849, a proceeding by *mandamus* cannot be joined with other actions. *Barada v. Carondelet*, 323.

## MARRIAGE CONTRACT.

1. A marriage contract, purporting to create a community according to the custom of Paris, contained this clause: "The said future spouses take each other, with their property and all the rights now actually belonging to them, and also those which may fall to or appertain to them, &c., which property shall wholly enter into the community," &c. *Held*, the words "which property," &c., must be understood as applicable only to that which came to them during marriage. *Childress & Mullanphy v. Cutter*, 24.

## MECHANICS' LIENS.

1. The new code does not abolish the proceeding by *scire facias* to enforce mechanics' liens. *Doellner v. Rogers*, 340.

## MISTAKE.

1. A mistake in the calculation of interest, in a settlement, will be relieved against by a court of equity. *Boon v. Miller's Executors*, 457.

## MORTGAGE.

1. No conveyance can be a mortgage, unless it is made to secure the payment of a debt or the performance of a duty, either existing at the time the conveyance is made, or to be created or to arise in the future. *Brant v. Robertson*, 129.
2. To determine whether a transaction was a conditional sale or a mortgage, courts will look, not only to the deeds and writings, but to all the circumstances of the contract, to ascertain the real intention of the parties. If the intention is doubtful, it will be held a mortgage, as this construction is more just and equitable. *Ibid.*
3. The interest of the mortgagor of personal property in the hands of the mortgagee, is not subject to sale under execution. *Sexton v. Monks*, 156.
4. The assignee of a lease by way of mortgage is not liable for rent, unless he enters into possession. *McKee v. Angelrodt*, 283.
5. A deed of trust was given to secure two notes. There was no clause in the deed providing that if one of the notes became due and remained unpaid, the other should also become payable. At the maturity of the first note, the property was sold, and the purchaser tendered to the trustee the amount of that note, and produced the receipt of the assignees of the grantor for the balance of his bid. *Held*, the purchaser had no right to a deed until he tendered the amount of both notes, rebating for interest on the note not actually due. *Kennedy v. Hammond & Hall*, 341.
6. A. gave B. a bond bearing six per cent. interest, secured by deed of trust on a slave. Afterwards, without intending to abandon his lien on the slave, B.

**MORTGAGE—(Continued.)**

takes from A. a new bond, bearing ten per cent. interest, and gives up the old bond. *Held*, B., by this act, does not lose his lien on the slave. But in such case, the slave is only subject to a lien for the amount of the old bond, with six per cent. interest. *McDonald v. Hulse*, 503.

**NEW CODE.**

See PRACTICE. MECHANICS' LIENS. PLEADING.

**NEW TRIAL.**

1. Where the plaintiff obtains a verdict for too large an amount, it is proper to allow him to enter a remittitur for the excess to avoid a new trial. *Hoyt v. Reed*, 294.
2. The statute directing that a second new trial shall not be granted to the same party, except when the triers of the fact shall have erred in a matter of law, or when the jury shall be guilty of misbehavior, proceeds upon the supposition that the law has been correctly expounded to the jury, and is only applicable to such cases. *Boyce v. Smith*, 317.
3. When a second new trial has been improperly granted, that matter can only be corrected by a *mandamus* from the supreme court. *Ib.*
4. When a new trial has been refused, the supreme court, on appeal or writ of error, will look into the record, and if it finds that incorrect law was given to the jury, will reverse the judgment and award a new trial, without regard to the number of new trials previously granted to the party. *Ibid.*
5. The supreme court will not control the discretion of inferior courts, in granting new trials in criminal cases, unless in cases strong and unequivocal. *State v. Cruise*, 391.

**NOTICE.**

See ASSIGNMENT, 2.

**OFF-SET.**

See SET-OFF.

**PARENT AND CHILD.**

1. In an action by a child against the administrator of his deceased mother, for money received by her in the capacity of guardian, the administrator will not be allowed to set up a claim for the support and education of the child by the intestate, when there is no evidence that she ever intended to make a charge therefor. *Guion v. Guion's Administrator*, 48.

**PARTNERSHIP.**

1. A judgment confessed by one partner, in the name of himself and his co-partner, is void as to the co-partner, and an execution issued thereon is properly quashed on his application. *Morgan v. Richardson*, 409.

See JOINT TENANTS AND TENANTS IN COMMON, 2.

**PATENT.**

See LANDS AND LAND TITLES. PRE-EMPTION, 2.

**PENAL BONDS.**

See BONDS AND NOTES.

**PLEADING.**

See PRACTICE, 1, 2, 10, 11.

1. In a pleading under the new code, it is not necessary to state the facts or circumstances by which the ultimate fact relied on is to be proved. *See v. Cox*, 166.
2. Under the new practice, courts of original jurisdiction should be liberal in allowing amendments to pleadings in furtherance of justice. *Dallam v. Bowman*, 225.

## PLEADING—(Continued.)

3. It is not necessary to declare upon an agreement not under seal, but it is admissible in evidence, in support of the common counts in an action of assumpsit. *Carroll v. Paul*, 226.
4. Although there is a variance between the declaration or bill of particulars, and the evidence offered in support of it, yet, where there have been previous trials of the cause, so that the introduction of the testimony is no surprise, the objection of variance is untenable. *Ibid.*
5. A petition, under the new code, which states that the defendant "made his note, and thereby promised to pay," &c., is sufficient, although the note, on its face, appears to have been executed by the defendant, as attorney for other parties. Under this allegation, the plaintiff may prove such facts as make the defendant personally liable. *McMartin v. Adams*, 268.
6. An allegation in a bill in equity, not denied in the answer, is not admitted, but must be proved. *Ingram & Hathaway v. Tompkins*, 399.

## POLICY.

See INSURANCE.

## PRACTICE.

See SUPREME COURT. LAW COMMISSIONER, 3. PLEADING. EVIDENCE, 12. NEW TRIALS, 2, 3, 4.

1. The thirteenth section of the seventh article of the new code, requiring either party relying upon a record, deed, or other writing, to file the original, or a copy, with his plea, is only applicable to cases in which the party recites his title in his pleading, as existing by written conveyances; or to a case in which the record, or writing, is recited in the pleading, as confirming or barring a right. *Sexton v. Monks*, 156.
2. Under the new code, a motion to strike out an answer which does not set up any legal defence to the action, is proper. *Niedelet v. Wales*, 214.
3. It is erroneous to take judgment by default against a defendant where there has been a judgment of non-suit against the plaintiff, which the record does not show to have been ever set aside. *Kelly v. Hogan*, 215.
4. Instructions, which are mere comments upon evidence, are properly refused. *Carroll v. Paul*, 226.
5. Under the new code, the St. Louis court of common pleas has equity jurisdiction. *McLaughlin v. McLaughlin*, 242.
6. Under the code, a person, claiming an interest in a suit adverse to the plaintiff, cannot become a party defendant without the permission of the court. In a suit in equity against a trustee, to get the legal title to property which had been conveyed to him by a deceased person, in trust for plaintiff, after the administrator has already made himself a party defendant, it is no error for the court to refuse permission to the widow, heirs and distributees of the deceased to become parties, as the administrator is competent to make all defence to the action. *Ibid.*
7. A *cestui que trust* files a bill in chancery against the trustee to get the legal title to the trust property. The administrator of the deceased grantor, in the deed of trust, on his application, is made a party defendant. During the trial, the plaintiff dismisses the suit, as to the trustee. *Held*, no judgment can be rendered against the administrator on a demand against the estate growing out of the trust property. *Ibid.*
8. The code does not affect the rule against multifariousness. A suit against the trustee for the legal title to the trust property, and against the administrator, on a demand growing out of the property, cannot be joined. *Ibid.*

PRACTICE—(Continued.)

9. Where the plaintiff obtains a verdict for too large an amount, it is proper to allow him to enter a remittitur for the excess, to avoid a new trial. *Hoyt v. Reed*, 294.
10. Under the new code, a proceeding by mandamus cannot be joined with other actions. *Barada v. Carondelet*, 323.
11. In a proceeding under the new code to recover personal property, the value of the property need not be stated in the petition, if it is stated in the affidavit; nor is the omission of the jury to find the value a fatal error. *Schaffer v. Faldwesch*, 337.
12. The new code does not abolish the proceeding by *scire facias* to enforce mechanics' liens. *Doellner v. Rogers*, 340.
13. One tenant in common may sue another under the new code of practice, without resorting to the action of account under the statute of 1845. *Rogers v. Pennistons*, 432.
14. If there is any evidence, however slight, it is error for a court to tell a jury there is none. *Hays v. Bell & Williams*, 496.
15. It is error for a court to give instructions to a jury which are supported by no evidence. *Ibid.*
16. When a party has filed one interplea in an attachment suit, and on the trial has taken a non-suit, it is no error for the court to strike out a second interplea filed by him in the same case, without leave of court. *Keiser's Administrator v. Moore & Chapman*, 179.
17. If a bill in chancery contains no equity, it should be demurred to; if it is allowed to stand, evidence should be admitted to sustain it. *Groves' Heirs v. Fulsome*, 543.
18. A circuit court has no right to dismiss an appeal from a justice on account of the smallness of the amount in controversy. *Harris v. Hughes*, 599.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

See SUPREME COURT, 6, 7. COSTS, 1.

PRE-EMPTION.

1. Under the act of congress of March 3d, 1843, a widow is not entitled to dower in land to which her husband had a mere right of pre-emption, which had not been consummated at the time of his death. *Wells' Guardian v. Moore*, 480.
7. A. entered a tract of land and, finding the wife of B. in possession without any claim of pre-emption, paid her for yielding up possession to him. Subsequently, she obtained a patent for the land from the government, under color of a right of pre-emption. *Held*, she holds the title thus acquired, as a trustee for the benefit of A. *Groves' Heirs v. Fulsome*, 543.
8. A married woman, whose husband is alive and has sold the improvements to another, under whom she is in possession, has no right of pre-emption, under the act of congress of May 29th, 1830, or any of the acts supplementary thereto. *Ibid.*

PRESCRIPTION.

See LIMITATIONS.

PRESUMPTIONS.

See ACCOUNT, 1. LANDLORD AND TENANT, 1. FOREIGN JUDGMENTS AND LAWS, 1.

PRINCIPAL AND AGENT.

See PLEADING, 5.

PROCESS.

1. The legislature has power to alter the return day of process. *Carson v. Walker*, 68.



## QUO WARRANTO.

1. Under the act concerning "towns," (R. S. 1845,) when the county court, under a state of facts which gave it jurisdiction over the subject matter, has declared a town incorporated, the validity of its charter can only be contested by a proceeding in *quo warranto*. *Kayser v. Bremen*, 88.

## RECORDS.

See FOREIGN JUDGMENTS AND LAWS, 2. EVIDENCE, 5.

1. To authenticate a record of a court of another state, under the act of congress of May 26, 1790, the certificate of the judge must state that *the attestation of the clerk is in due form*. *Wilburn's Administrator v. Hall*, 428.

## RELEASE.

1. A., as security of B., signs a note payable to C. Usury, which B. has contracted to pay C. is included in the amount on the face of the note. *Held*, the omission to disclose this fact to A. will not operate to discharge him. *Samuel v. Withers*, 532.

## REMITTITUR.

See PRACTICE, 12.

## REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

## SALES.

See SET-OFF, 1.

1. Under the act of January 25, 1817, where an execution against the estate of a deceased person was issued in less than eighteen months after the date of the letters testamentary, but the sale of the lands under it did not take place until more than eighteen months had elapsed, the sale is valid. *Carson v. Walker*, 68.
2. To determine whether a transaction was a conditional sale or a mortgage, courts will look, not only to the deeds and writings, but to all the circumstances of the contract, to ascertain the real intention of the parties. If the intention is doubtful, it will be held a mortgage, as this construction is more just and equitable. *Brant v. Robertson*, 129.
3. A sheriff's sale under execution may be shown to be collusive or fraudulent, and that there was a secret reservation of a trust in favor of the defendant, with the consent of the purchaser. *Dallam v. Bowman*, 225.
4. A sold B. certain slaves, warranting his title to be good. *Held*, as long as B. remains in undisturbed possession of the slaves, he cannot set up, as defence to a note given for the purchase money, that, at the time of the sale, the title was not in A. In such a case, there is no failure of consideration, within the meaning of the fourteenth section of article five of the act concerning "Justices' Courts," (R. S. 1845.) *Morrison v. Edgar*, 411.

## SCHOOL LAND (reserved by the act of 1812.)

See LANDS AND LAND TITLES, from 7 to 16 inclusive.

## SCIRE FACIAS.

1. The new code does not abolish the proceeding by *scire facias* to enforce mechanics' liens. *Doellner v. Rogers*, 340.

## SET-OFF.

1. A. sold B. a horse and received in exchange a yoke of oxen, and was to receive ten dollars besides. A. warranted the horse to be sound and agreed to take him back if he proved unsound. The horse proving unsound, B. offered to return him and demanded back his oxen. *Held*, in an action by A. against B. for the ten dol-



SET-OFF—(Continued.)

- lars, B. may set-off and recover the value of the oxep. *Smith v. Steinkamper*, 150.
2. When a defendant, who is sued for rent under an express covenant, files an off-set for damages sustained by a rise in the river, which rendered a part of the leasehold premises untenable, it is properly stricken out on motion. *Niedelet v. Wales*, 214.
3. A set-off is not admissible where the claim on either side is for unliquidated damages. *Johnson v. Jones*, 494.

SHERIFFS' DEED.

See EJECTMENT, 1.

SHERIFFS' SALES.

See SALES, 3.

SLAVES.

1. The delivery of a slave, on a bailment by way of loan, does not subject the property to the debts of the bailee, until possession shall have continued five years under the loan. *McDermott v. Barnum & Moreland*, 114.

See TRESPASS, 2. MORTGAGES, 6.

SPANISH LAW.

See *Childress & Mullanphy v. Cutter*, 24.

SUPREME COURT.

See INJUNCTIONS. NEW TRIALS, 3, 4.

1. Under the new code, where a case has been tried by the court below without a jury, and the finding of facts is incomplete on its face, the case will be reversed. *Brant v. Robertson*, 129.
2. The supreme court is averse to interfering with the exercise of discretion by inferior courts, in the matter of permitting amendments to pleadings. *Dallam v. Bowman*, 225.
3. Under the new code, when a case has been tried by the court below, without a jury, and there is no finding of facts preserved in the record, the judgment will be affirmed. *Rucker v. Musick*, 316.
4. Although the supreme court will not interfere with the verdicts of juries on the ground that they are against the weight of evidence, yet when hard cases appear to arise under the operation of this rule, it must be satisfied that the instructions are entirely unexceptionable. *Carroll v. Paul*, 226.
5. The supreme court will presume that the court below decided correctly, unless the record shows the contrary. *State v. Felps*, 384.
6. The supreme court will not reverse either a criminal or civil case, for the refusal of the court below to instruct the jury that evidence of verbal confessions is to be received with great caution. *State v. Clump*, 385.
7. The supreme court will not disturb the finding of facts by a jury in a criminal case, unless manifest injustice and wrong have been done; nor will it control the discretion of the court below, in granting new trials, unless in cases strong and unequivocal. *State v. Cruise*, 391.
8. The supreme court cannot exercise original jurisdiction by ordering a chancery case, on appeal, to be referred to a commissioner. Where the court is not satisfied from the evidence in the bill of exceptions that the decree of the court below was correct, and no account was taken, so that it is impossible to state what errors were committed, the case will be reversed and remanded, with directions to the court below to have an account stated between the parties. *Knowles v. Mercer*, 455.

## SUPREME COURT—(Continued.)

9. When a case is tried by the court below, sitting as a jury, and no exception is taken, the supreme court will not review its finding of the facts. *Leith v. Steamboat Pride of the West*, 181.

## SURETY.

1. In a suit against the securities on a note given for the price of a slave, a breach of the warranty of soundness may be set up by them in defence, though the warranty was to the principal alone, who is not joined. *Scroggin & Smith v. Holland*, 419.
2. A., as security of B., signs a note payable to C. Usury which B. has contracted to pay C. is included in the amount on the face of the note. *Held*, the omission to disclose this fact to A. will not operate to discharge him. *Samuel v. Withers*, 532.

## SURVEYS.

See CONVEYANCES, 1. LANDS AND LAND TITLES.

## TOWNS.

1. Under the act concerning "towns," (R. S. 1845,) when the county court, under a state of facts which gave it jurisdiction over the subject matter, has declared a town incorporated, the validity of its charter can only be contested by a proceeding in *quo warranto*. *Kayser v. Bremen*, 88.
2. That act is constitutional. The duties imposed on the county court are judicial and not legislative in their nature. *Ibid*.

## TRESPASS.

1. To enable a person to justify, under the act concerning "Inclosures," (R. S. 1845,) for killing his neighbor's stock, he must bring himself exactly within the protection of the statute. *Early v. Fleming*, 154.

See LANDLORD AND TENANT, 1.

2. A. brought an action of trespass against B. for the value of a negro woman slave taken and converted by B. to his own use, and recovered a judgment, which was satisfied. During the pendency of the suit, the slave was delivered of a child. A. afterwards brings another suit for the value of the child. *Held*, A. cannot recover, as the interest which accrued during the pendency of the first suit, by the birth of the child, was merely an incident to the principal object of the suit, and might have been taken into consideration by the jury in assessing the damages in that suit. *Garth v. Everett*, 490.
3. A. sets fire to the stubble on his inclosure, and, without any negligence or default on his part, and by inevitable accident, it escapes and crosses over the open prairie to the inclosure of B. and burns his fence. *Held*, A. is not liable to an action for the damage.  
*Query*, If the stubble is fired on Sunday? *Miller v. Martin*, 505.

## TRUSTS AND TRUSTEES.

1. A trustee has no power, by a deed substituting another trustee, to change the nature of the trust, or the use of the trust fund. *Clark v. Maguire*, 302.
2. A. entered a tract of land, and finding the wife of B. in possession without any claim of pre-emption, paid her for yielding up possession to him. Subsequently, she obtained a patent for the land from the government, under color of a right of pre-emption. *Held*, she holds the title thus acquired as a trustee for the benefit of A. *Groves' Heirs v. Fulsome*, 543.
3. Frauds and trusts are not within the statute of frauds. *Ibid*.

## USURY.

See RELEASE, 1.

## VARIANCE.

See PLEADING, 5. EVIDENCE, 11.

## VERDICTS.

1. Although the supreme court will not interfere with the verdicts of juries, on the ground that they are against the weight of evidence, yet, when hard cases appear to arise under the operation of this rule, it must be satisfied that the instructions are entirely unexceptionable. *Carroll v. Paul*, 226.
2. Where the plaintiff obtains a verdict for too large an amount, it is proper to allow him to enter a *remittitur* for the excess, to avoid a new trial. *Hoyt v. Reed*, 294.

## WAGERS.

See GARNISHMENT,

## WARRANTY.

1. A. sold B. a horse and received in exchange a yoke of oxen, and was to receive ten dollars besides. A. warranted the horse to be sound and agreed to take him back if he proved unsound. The horse proving unsound, B. offered to return him and demanded back his oxen. *Held*, in an action by A. against B. for the ten dollars, B. may set-off and recover the value of the oxen. *Smith v. Steinkamper*, 150.
2. A. sold B. certain slaves, warranting his title to be good. *Held*, as long as B. remains in undisturbed possession of the slaves, he cannot set up, as a defence to a note given for the purchase money, that, at the time of the sale, the title was not in A. In such a case, there is no failure of consideration, within the meaning of the fourteenth section of article five of the act concerning "Justices' Courts," (R. S. 1845.) *Morrison v. Edgar*, 411.
3. In a suit against the securities on a note given for the price of a slave, a breach of the warranty of soundness may be set up by them in defence, though the warranty was to the principal alone, who is not joined. *Scroggin & Smith v. Holland*, 419.

## WILLS.

1. Particular words in a will, if possible, will be so construed as to harmonize with the general intent of the testator, as collected from the whole will. *Peters v. Carr*, 54.

## WITNESSES.

1. An action under the seventh section of the act concerning witnesses, (R. S. 1845,) against a person for failing to attend as a witness, when duly summoned, &c., may be begun before the determination of the suit. *Connett v. Hamilton*, 442.
2. In such a case, a transcript of the subpoena served on the party, and of the record of a part of the proceedings in the case, is admissible evidence, although the full record is not offered. *Ibid.*

## WRIT OF ERROR.

1. A writ of error does not lie from the St. Louis law commissioner's court to the circuit court. *Little v. Sellick*, 269.